CC 1.12/2 9:94/2

284-A

DocCtr
HE
7761
.A381

VOL. 94 (2d Series) March 1–31, 1984 No. 2

# FEDERAL COMMUNICATIONS COMMISSION REPORTS

## (94 F.C.C. 2d)

**Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States**

## VOLUME 94 (2d Series)

## Pages 501 to 1017

**Reported by the Commission**

UNIV. of MICH.
MAY 1 1984
Documents Center

## FEDERAL COMMUNICATIONS COMMISSION

Mark S. Fowler, *Chairman*

James H. Quello
Mimi Weyforth Dawson
Henry M. Rivera
Dennis R. Patrick*

Commissioner Fogarty's term expired June 30, 1983.
Commissioner Jones resigned May 31, 1983.
Commissioner Sharp's term expired June 30, 1983.
*Sworn in December 2, 1983.

UNITED STATES GOVERNMENT PRINTING OFFICE • WASHINGTON, D.C.

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402—on a subscription basis

UNIVERSITY OF MICHIGAN
LIBRARIES
MAY 8 1984
DEPOSITED BY THE
UNITED STATES OF AMERICA

Notice: The contents of this pamphlet are subject to correction by means of an erratum appearing in the bound volumes of the *F.C.C. Reports.* Users are requested to notify the F.C.C. Publications Branch of errors so that an erratum can be inserted in the bound volume.

NOTE: The index to this pamphlet includes alphabetized document titles and other descriptive data accumulated from previous and current issues in this particular volume. Refer to pages shown on the cover of the pamphlet to distinguish which documents are available in this issue.

INDEX


Page

Accuracy In Media; re Application for Review denied, Section 1.115(g), (FCC 83–293) ..... 501
Advanced Business Communications; re Applications to construct and launch space stations granted, (FCC 83–187) ..... 1
Amendment of Part 15; re Radio noise emissions measurements for computing devices, Gen Docket No. 80–284, (FCC 83–352) ..... 508
Amendment of Part 68; re Notice of Proposed Rulemaking adopted, CC Docket No. 81–216, (FCC 83–268) ..... 5
Amendment of Part 94 & 15; re *Report and Order* adopted, Gen. Docket No. 79–337, (FCC 83–166) ..... 32
American Satellite Co.; re Applications to construct and launch space stations granted, (FCC 83–189) ..... 39
American Security Council; re Application for Review of a Bureau ruling denied, (FCC 83–292) ..... 521
American Telecommunications Corp.; re Waiver of rules for cordless telephone, Section 15.7, (FCC 83–358) ..... 531
A.S.D. Answer Service, Inc.; re Authority to construct paging stations in DPLMRS, CC Docket No. 82–587, (FCC 83–277) ..... 539
AT&T Co.; re Petition for waiver of rules granted, (FCC 83–287) ..... 545
AT&T Co.; re Petitions to reject/suspend and investigate tariffs denied, (FCC 83–288) ..... 551
AT&T Co.; re Investigation of tariff revisions, CC Docket No. 81–351, (FCC 83–289) ..... 566
AT&T Co.; re Application to construct and launch an additional space station granted, (FCC 83–188) ..... 44
Basic Packet Switching Service; re Applicaton for Section 214 authority granted, (FCC 83–221) ..... 48
Beaufort County B/cing Co.; re Review Board affirms Initial Decision and grants FM construction permit, BC Docket No. 80–775 (FCC 83R–51) .. 572
Beaufort County B/cing Co.; re Applications for construction permit and FM station, BC Docket No. 80–775, (FCC 82D–77) ..... 578
Broadcast Regulation; re Policy Statement, (FCC 83–339) ..... 619
Buena Vista Telecasters of Texas, Inc.; re Review Board approved settlement agreement, BC Docket No. 81–310, (FCC 83R–56) ..... 625
Buena Vista Telecasters of Texas, Inc.; re In applications for construction permit, BC Docket No. 81–310, (FCC 83D–1) ..... 630
Caldwell TV Associates, Ltd.; re Application for Review granted, Sections 73.3572(c) and 1.227(b) of the Rules waived, (FCC 83–257) ..... 69
Cannon's Point B/cing Co.; re Petition for reconsideration of Review Board decision denied, BC Docket No. 81-306, (FCC 83R–38) ..... 72
Cellular Communications Systems; re Applications for Review granted, (FCC 83–286) ..... 74
Coastal Bend Family TV, Inc.; re Review Board modifies I.D. and disagrees with ALJ's conclusions, BC Docket No. 80–460, (FCC 83R–46) 648

Coastal Bend Family TV, Inc.; re Applications for construction permit, BC Docket No. 80–460, (FCC 83D–3) ..... 661
Commercial TV Stations; re *Notice of Proposed Rule Making* adopted, MM Docket No. 83–670, (FCC 83–313) ..... 678
Computer II Implementation; re Rules proposed for the detariffing of embedded customer premises equipment, CC Docket No. 81–893, (FCC 83–181) ..... 76
Conservative Caucus, Inc.; re Application for review denied, (FCC 83–314) 728
Council of Allergy/Immunology; re Application for Review of Bureau ruling denied, (FCC 83–294) ..... 734
D.H. Overmyer Telecasting Co. Inc.; re Application for assignment of license granted, (FCC 83–224) ..... 117
Direct B/c Satellite Service; re Regulatory policy, Gen. Docket No. 80–603, (FCC 83–241) ..... 741
Domestic Fixed-Satellite Service; re Assignment of orbital locations, (FCC 83–186) ..... 129
Eulogio Cardona y Beltran; re Application for Review denied, (FCC 83–262) ..... 146
Faith Center, Inc.; re Review Board denied appeal, BC Docket No. 82–339, (FCC 83R–47) ..... 756
FM Broadcast Stations; re Final rule making order adopted, BC Docket No. 80–90, (FCC 83–259) ..... 152
GACO Communications Corp.; re Review Board affirms Initial Decision, BC Docket No. 80–484, (FCC 83R–44) ..... 761
GACO Communications Corp. re Applications for construction permit for television station, BC Docket No. 80–484, (FCC 82D–74) ..... 783
GAF B/cing Company, Inc.; re Petition to accept late-filed pleading granted, (FCC 83R–39) ..... 203
Georgia Cablevision Corp.; re Petition for tax certificate granted, (FCC 83–225) ..... 207
Global B/cing Group, Inc.; re Review Board Decision modified, BC Docket No. 82–531, (FCC 83–321) ..... 809
Golden State B/cing Corp.; re Review Board affirmed ALJ's grant, BC Docket No. 79–56, (FCC 83R–35) ..... 212
Golden State B/cing Corp.; re Application denied, BC Docket No. 79–56, (FCC 82D–67) ..... 220
GTE Corporation & Southern Pacific Co.; re Order adopted, (FCC 83–269) ..... 235
Henry C. Armstrong, III; re Petition for reconsideration denied, PR Docket No. 81–826, (FCC 83R–36) ..... 268
Horne Industries, Inc.; re Review Board affirms Initial Decision, BC Docket No. 81–551, (FCC 83R–49) ..... 815
Hughes Communications; re Application to construct and launch an additional space station granted, (FCC 83–190) ..... 271
Kirk Merkley; re Involuntary assignment of Station License KPRQ, (FCC 83–310) ..... 829
Lares Broadcasting Corp.; re Commission reaffirmed grant of CP for AM station, Docket No. 20969, (FCC 83–233) ..... 841
Louisiana/Mississippi B/c Stations; re License renewal applications of certain Louisiana and Mississippi broadcast stations, (FCC 83–228) ..... 275
Market Structure (Phase III); re Notice of Proposed Rulemaking adopted, CC Docket No. 78–72, (FCC 83–178) ..... 292
MCI v. AT&T; re Motion for Expedited Disposition granted and complaint dismissed, CC Docket No. 81–217, (FCC 83–236) ..... 332
MCI v. AT&T; re Formal complaint, CC Docket No. 81–217, (FCC 81D–62) ..... 360
MTS/WATS Market Structure (Phase IV); re Notice of Proposed Rulemaking adopted, CC Docket No. 78–72, (FCC 83–254) ..... 396
MTS/WATS Market Structure; re Access charges, CC Docket No. 78–72, (FCC 83–252) ..... 852

NARUC; re Petition for declaratory ruling granted to an extent and otherwise denied, (FCC 83–222) ..... 409
Octagon B/cing Co.; re Petition for Declaratory Ruling granted in part, (FCC 83–308) ..... 861
Pacific Telecommunications; re Partial reconsideration of Report and Order, 47 FR 57040, granted, CC Docket No. 81–343, (FCC 83–270) .... 867
Peoples B/cing Corporation; re Review Board denied petitions for reconsideration and affirmed Decision, BC Docket No. 78–243, (FCC 83R–33) ..... 429
Rainbow Satellite, Inc.; re Applications to construct and launch space stations granted, (FCC 83–191) ..... 437
RCA American Communications; re Applications to construct and launch space stations granted, (FCC 83–192) ..... 441
RKO General, Inc. (KHJ-TV); re Commission remanded comparative proceeding to ALJ, Docket No. 16679, (FCC 83–274) ..... 879
RKO General, Inc.; re Competing applicants made parties to remanded proceeding involving same licensee, (FCC 83–341) ..... 890
Satellite Business Systems; re Applications to construct and launch space stations granted, (FCC 83–193) ..... 447
Seven Locks B/cing Co.; re Mutually exclusive applications designated for hearing, MM Docket No. 83–667, (FCC 83–309) ..... 899
South Florida B/cing Co. Inc.; re Bureau policy overturned, BC Docket No. 82–731, (FCC 83–265) ..... 452
S. Pacific Communications Co.; re Application to construct and launch an additional space station granted, (FCC 83–194) ..... 457
Superior B/cing of Calif.; re Review Board affirms Initial Decision, BC Docket No. 80–734, (FCC 83R–52) ..... 904
Superior B/cing of Calif.; re Applications for construction permit for television station, BC Docket No. 80–734, (FCC 83D–6) ..... 912
Trefoil Broadcasting Co., Inc.; re Review Board affirms ALJ's dismissal of application, MM Docket No. 83–61, (FCC 83R–54) ..... 928
Trio Broadcasters, Inc.; re Proceeding remanded, BC Docket No. 82–701, (FCC 83R–48) ..... 934
United B/cing Company, Inc.; re Review Board affirms grant of challenger's application in renewal proceeding, BC Docket No. 80–479, (FCC 83R–55) ..... 938
United B/cing Company, Inc.; re Applications for renewal of license for WOOK(FM), BC Docket No. 80–479, (FCC 82D–73) ..... 960
U.S. Satellite Systems, Inc.; re Applications to construct and launch space stations granted, (FCC 83–195) ..... 462
Western Union Telegraph Co.; re Applications to construct and launch space stations granted, (FCC 83–196) ..... 467
Western Union Telegraph Co.; re *Memorandum Opinion, Order and Certificate* adopted, (FCC 83–253) ..... 472
Whitco Broadcasters, Inc.; re Review Board granted joint request for approval of agreement, BC Docket No. 81–733, (FCC 83R–50) ..... 1000
Whitco Broadcasters, Inc.; re Applications for construction permit, BC Docket No. 81–733, (FCC 83D–24) ..... 1003
WKKQ, Inc.; re Petitions for Extraordinary Relief and Leave to Intervene dismissed, BC Docket No. 82–227, (FCC 83R–37) ..... 482
WKKQ, Inc.; re Application for construction permit, BC Docket No. 82–227, (FCC 83D–7) ..... 484

Administrative Law Judge, Discretion

Competing applicants made parties to remanded proceeding involving same licensee. Parties to select representative counsel and ALJ to exercise broad discretion in expediting case. Commission will invoke collateral estoppel to preclude relitigation of common issues. During pendency of inquiry into licensee's qualifications, rules authorizing amendments to applications are suspended.
*–RKO General, Inc. (WHBQ–TV)*

Advertising

*Notice of Proposed Rule Making* adopted soliciting comment on regulatory proposals that would amend policies with respect to commercial TV programming, commercialization, ascertainment, and program logging.
*–Commercial TV Stations*
MM Docket No. 83–670

Agreement, Between Applicants

Review Board granted joint request for approval of agreement calling for grant of one application and dismissal of competing applications. Unauthorized pleading seeking condition on grant dismissed. Board on its own motion, however, added condition to the award of the construction permit.
*–Whitco Broadcasters, Inc.*
BC Docket No. 81–733

Application, Amendment of, After Designation, Rejected

Review Board affirms Initial Decision and grants FM construction permit to applicant proposing a first local transmission service, pursuant to Sec. 307(b) of Communications Act. Board rejected losing applicant's post-hearing amendment, which sought to change proposed community, for lack of good cause; doctrine of judicial estoppel applies.
*–Beaufort County B/cing Co.*
BC Docket No. 80–775

Application, Amendment of, Current Information

Commission remanded comparative proceeding to ALJ for expedited consideration of renewal applicant's qualifications. Case before Commission by virtue of Court remand order directing the Commission to inquire into impact of licensee's disqualification in a related case. Standing of competing applicant affirmed, petitions for leave to amend granted for limited purpose of complying with Rule 1.65.
*–RKO General, Inc. (KHJ-TV)*
*Docket No. 16679*

Application, Amendments of, Need for

(See: Administrative Law Judge, Discretion-*RKO General, Inc. (WHBQ-TV)*

Application, Dismissal of

Review Board affirms ALJ's dismissal of application where applicant

proposed a major change to its application within the meaning of Section 73.3572(a)(1).
*–Trefoil Broadcasting Co., Inc.*
MM Docket No. 83–61

Application for Review
Application for review denied. Complainant must identify a particular well-defined controversial issue of public importance. In addressing overall programming, complainant must consider programming aired prior to a subject broadcast.
*–Conservative Caucus, Inc.*

Application for Review
Application for Review of Bureau ruling denying a complaint against the ABC television network denied. Complainant failed to establish that the treatment of allergy sufferers is a controversial issue of public importance.
*–Council of Allergy/Immunology*

Application, For Review, Time for Filing
Petition for Reconsideration must be timely filed. Follow-up complaint must be filed within reasonable time (normally within 30 days) after Commission denial of initial complaint.
*–Accuracy In Media*

Bankruptcy
While the Commission has a general policy of not questioning the appointment of a receiver or trustee in bankruptcy by state and federal courts, where such an appointment involves the enforcement of a reversionary interest in a broadcast license and the recognition of a security interest in that license by creditors, the application seeking consent to assign the broadcast license to receiver or trustee is unacceptable for filing.
*–Kirk Merkley*

Broadcast Experience
Review Board Decision modified. Diversification and minority ownership entitled to less significance in an interim proceeding whereas broadcast experience has more significance than in a permanent licensing proceeding. Petition to add misrepresentation and proposed programming issues based on allegations that program plans have changed denied. Failure to report death of principal not warrant Section 1.65 issue.
*–Global B/cing Group, Inc.*
BC Docket No. 82–531

Broadcast, Re-Regulation
(See: Advertising-*Commercial TV Stations*)

Candor
Applicant found financially unqualified because of lack of good cause for late-filed financial amendment and failure to demonstrate reasonable assurance, on the merits, that sufficient financial resources

would be available. Substantial comparative demerit assessed for lack of candor in setting forth proposed financial resources, and *prima facie* basis for remand on additional financial misrepresentation issue noted.
*–Coastal Bend Family TV, Inc.*
BC Docket No. 80–460

Review Board affirms Initial Decision and grants application with substantial diversification and integration preferences and slight-to-moderate comparative demerit for careless lack of candor in reporting principal's voting interest in another licensee as "non-voting" and failing to report other licensee's application for, and subsequent grant of, television station in region. Cross-interest policy clarified.
*–Superior B/cing of Calif.*
BC Docket No. 80–734

CATV Carriage, Significant Viewing Test
Granted in part request of television broadcast station to be declared significantly viewed. Station met test levels in seven counties in 1976, but no longer meets levels in one county today.
*–Octagon B/cing. Co.*

Character Qualifications, Lack of Candor
(See: Application, Amendment of, Current Information-*RKO General, Inc. (KHJ-TV)*

Common Carrier, Rate Revision, Authority to Make
*Memorandum Opinion and Order* adopted denying petitions to reject or suspend and investigate and permitting AT&T to conduct an experiment with its MTS rates in the trial states of New York, California and Iowa to expire on December 31, 1983.
*–AT&T Co.*

Common Carrier, Rate Structure, Inquiry
Part time/full time rate structure based on 60;40 percent division of present and future revenue requirements-adopted as reasonable for AT&T's Series 7000 Terrestrial Television Transmission Services. Further action investigating unjust discrimination deferred until further notice.
*–AT&T CO.*
CC Docket No. 81–351

Common Carrier, Specialized Services
Rules adopted for computation and assessment of end user and carrier's carrier access charges and the creation of an exchange carrier association to prepare access charge tariffs and distribute pooled access charge revenues.
*–MTS/WATS Market Structure*
*CC Docket No. 78–72*

Common Carrier, Specialized Services
Petition for waiver of rules prescribing rate structure for use of local transport facilities to originate or terminate interstate or foreign telecommunications granted. Rules had assumed equal interconnection

opportunity for all interexchange carriers.
*–AT&T Co.*

Comparative Hearing
(See: Application, Amendment of, After Designation, Rejected-*Beaufort County B/cing Co.*)

Comparative Hearing
Review Board approved settlement agreement after finding it will not impede fair, efficient, and equitable distribution of television service as required by Sec. 307(b) of Communications Act. Since the competing applications were for different suburbs of a large city and since television channels must serve broader areas than radio stations, no Sec. 307(b) preference could properly have been awarded to either applicant.
*–Buena Vista Telecasters of Texas, Inc.*
BC Docket No. 81–310

Review Board affirms Initial Decision, financially disqualifies one commercial VHF television applicant, and grants competing application. Disqualified applicant relied heavily on equipment "on hand," which was in poor condition and was not shown to be functional in quality and adequate in amount, and substantially underestimated its programming costs.
*–GACO Communications Corp.*
*BC Docket No. 80–484*

Comparative Hearing
(See: Candor-*Superior B/cing of Calif.*) Computing Device

*Memorandum Opinion and Order* adopted amending Part 15 of Rules concerning radio noise emissions measurements for computing devices. This MO&O makes a number of minor changes in the specific instructions contained in the procedure. In addition, the measurement procedures are removed from Part 15 Appendix A and will be published as an FCC Measurement Procedure MP-4.
*–Amendment of Part 15*
GEN. Docket No. 80–284

Contour, Overlap
Proceeding remanded because factual basis upon which ALJ relied in granting applications and terminating proceeding was incorrect.
*–Trio Broadcasters, Inc.*
BC Docket No. 82–701

Control, Transfer of, Procedures
(See: Bankruptcy-*Kirk Merkley*)

Control, Transfer of, Unauthorized
Mutually exclusive applications designated for hearing. Failure to file an application for transfer of control based on a gradual change of majority of board members of a licensee's parent, nonprofit, non-stock entity will not reflect adversely on licensee where the requirement for such application is unclear and the licensee has otherwise notified the

Commission of the changes.
*–Seven Locks B/cing Co.*
MM Docket No. 83–667

Cordless Telephone
*Memorandum Opinion and Order* adopted reconsidering a waiver of Rules for a cordless telephone. This MO&O responds to petitions for reconsideration of the waiver Order and reaffirms the Commission's original decision.
*–American Telecommunications Corp.*

Coverage, Misrepresentation
Commission will no longer maintain policies against the misuse of audience ratings data or the use of inaccurate or exaggerated coverage maps or coverage claims by broadcast licensees.
*–Broadcast Regulation*

Cross Interest
(See: Candor-*Superior B/cing of Calif.*)

Cut-Off Rules
(See: Application, Amendment of, Current Information-*RKO General, Inc. (KHJ-TV)*

Declaratory Ruling
(See: CATV Carriage, Significant Viewing Test-*Octagon B/cing Co.*)

Disclosure, Candid
Review board affirms grant of challenger's application in a comparative FM renewal proceeding. Incumbent is not awarded a renewal expectancy and receives a substantial comparative demerit on past misconduct. Losing competing applicant aschieves slight specialized program format preference for first nighttime Spanish programming and slight reporting demerit for uncandid application answer.
*–United Broacasting Company, Inc.*
BC Docket No. 80–479

Discovery
Review Board denied appeal of dismissal of television renewal application because licensee failed to comply with valid discovery requests and orders. Asserted grounds for non-compliance were previously rejected by Board, Commission, and courts. Also, appeal from dismissal of late-filed petition to intervene is denied because Rule Sec. 1.223 requirements not met.
*–Faith Center, Inc.*
*BC Docket No. 82–339*

Discovery, Proceedings, Scope of
Discovery granted in part and claim of attorney-client privilege disallowed on finding that applicants waived right to assert privilege. Discovery denied with respect to documents protected by attorney-work-product doctrine.

–*A.S.D. Answer Service, Inc.*
*CC Docket No. 82–587*

Diversification, of Control of Mass Media _

Equipment Authorization Program
(See: Computing Device-*Amendment of Part 15*)

Equipment Authorithorization Program
(See: Cordless Telephone-*American Telecommunications Corp.*)

Equipment, Inspection
(See: Comparative Hearing-*GACO Communications Corp.*)

Estoppel
(See: Application, Amendment of, After Designation, Rejected-*Beaufort County B/cing Co.*)
(See also: Adminstrative Law Judge, Discretion–*RKO General, Inc. (WHBO-TV)*)

Expedited Action
(See: Adminstrative Law Judge, Discretion-*RKO General, Inc. (WHBO-TV)*)

Fairness Doctrine
(See: Application, For Review, Time for Filing-*Accuracy in Media*)
Application for Review of a Bureau ruling denying a complaint against CBS television network denied. Complainant has failed to establish that CBS did not present contrasting viewpoints in its overall programming on the issue of "National Defense: do we need less or do we need more?" –*American Security Council*

(See also: Application, For Review, Time for Filing-*Accuracy In Media*)

(See also: Application for Review-*Council of Allergy/Immunology*)

Fairness Doctrine, Complaint, Sufficiency in Overall Programming
(See: Fairness Doctrine-*American Security Council*)

(See also: Application for Review-*Conservative Caucus, Inc.*)

Fairness Doctrine, Controversial Issue of Public Importance
(See: Application for Review-*Conservative Caucus, Inc.*)

(See also: Application for Review-*Council of Allergy/Immunology*)

Fairness Doctrine, Controversial, Within Overall Programming
(See: Fairness Doctrine-*American Security Council*)

Fairness Doctrine, Refiling of Complaint
(See: Application, For Review, Time for Filing-*Accuracy In Media*)

Female Ownership-Participation, Compare Credit for

Review Board affirms Initial Decision, 91 FCC 2d 1198, grant of FM

station construction permit to one of two competing 100%-intergrated applicants. Winner has substantial enhancement credit for 100% female ownership participation in management; loser's credit is insignificant because its integrated minority ownership is only 15%.
–*Horne Industries, Inc.*
BC Docket No. 81–551

FM Station, Authorization
(See: Female Ownership-Participation, Compare Credit for-*Horne Industries, Inc.*)

(See also: Application, Amendment of, After Designation, Rejected-*Beaufort County B/cing Co.*)

Financial Qualifications, Estimated Costs
(See: Comparative Hearing-*GACO Communications Corp.)*

Financial Qualifications, Loan Commitment, Ability to Meet
(See: Candor-*Coastal Bend Family TV, Inc.*)

Frequency Allocation
Reallocation of spectrum to enable establishment of new Direct Broadcast Satellite service affirmed on reconsideration, given policies and procedures adopted to protect legitimate interests of existing users of the frequency band.
–*Direct B/c Satellite Service*
GEN. Docket No. 80–603

Frequency Allocation Rules
Commission reaffirmed grant of CP for AM station. Section 73.37(b)(2) of Commission's domestic allocation rules waived and international treaties not considered a bar to grant of construction permit.
–*Lares Broadcasting Corp.*
Docket No. 20969

Grant, Conditional
(See: Agreement, Between Applications-*Whitco Broadocasters, Inc.*)

Inquiry by FCC
(See: Common Carrier, Specialized Services-*MTS/WATS Market Structure*)

Interference, Cochannel
(See: Frequency Allocation Rules-*Lares Broadcasting Corp.*)

Interlocutory Ruling, Appeal from
(See: Discovery-*Faith Center, Inc.*)

International Agreements
(See: Frequency Allocation Rules-*Lares Broadcasting Corp.*)

Intervention, Request for, Denied
(See: Discovery-*Faith Center, Inc.*)

(See also: Application, Amendment of, Current Information-*RKO General, Inc. (KHJ-TV)*

Issue, Rule 1.65
(See: Broadcast Experience-*Global B/cing Group, Inc.*)

License, Assignment of, By Receiver in Bankruptcy
(See: Bankruptcy-*Kirk Merkley*)

License, Assignment of, Involuntary
(See: Bankruptcy-*Kirk Merkley*)

License, Assignment of, Procedures
(See: Bankruptcy-*Kirk Merkley*)

Low Power Communications Device
(See: Cordless Telephone-*American Telecommunications Corp.*)

Measurement, Computing Devices
(See: Computing Device-*Amendment of Part 15*)

Message Telecommunications Service
(See: Common Carrier, Rate Revision, Authority to Make-*AT&T Co.*)

Minority Ownership, Factor in Comparative Hearing
(See: Female Ownership-Participation, Compare Credit for-*Horne Industries, Inc.*)

Minority Ownership, Factors in Comparative Proceeding
(See: Broadcast Experience-*Global B/cing Group, Inc.*)

Misconduct
(See: Disclosure, Candid-*United Broadcasting Company, Inc.*)

Misrepresentation, Character Qualifications
(See: Broadcast Experience-*Global B/cing Group, Inc.*)

Misrepresentation, Financial Qualifications
(See: Candor-*Coastal Bend Family TV, Inc.*)

Ownership Disclosure
(See: Candor-*Superior B/cing of Calif.*)

Party, Joinder of
(See: Administrative Law Judge, Discretion-*RKO General, Inc. (WHBQ-TV)*

Past Performance
(See: Disclosure, Candid-*United Broadcasting Company, Inc.*)

Pleading Dismissal of
(See: Agreement, Between Applicants-*Whitco Broadcasters, Inc.*)

Privileged Communications
(See: Discovery, Proceedings, Scope of-*A.S.D. Answer Service, Inc.*)

Programming Proposal
(See: Broadcast Experience-*Global B/cing Group, Inc.*)

Programming, Specialized
(See: Disclosure, Candid-*United Broadcasting Company, Inc.*)

Program Requirements
(See: Advertising-*Commercial TV Stations*)

Radio Frequency Device Authorization
(See: Computing Device-*Amendment of Part 15*)

(See also: Cordless Telephone-*American Telecommunications Corp.*)

Ratings, Distortion of, See also Hypoing
(See: Coverage, Misrepresentation-*Broadcast Regulation*)

Reconsideration, Petition for, Partial Grant of
Order adopted granting partial reconsideration of the Commission's Report and Order (adopted November 18, 1982) in CC Docket No. 81-343, where petitioner had shown willingness to use circuit-multiplication equipment to increase the effective capacity of its cable circuits.
–*Pacific Telecommunications*
CC Docket No. 81–343

Remand
(See: Contour, Overlap-*Trio Broadcasters, Inc.*)

Remand from Court of Appeals
(See: Application, Amendment of, Current Information-*RKO General, Inc. (KHJ-TV)*)

Television Station, Authorization
(See: Comparative Hearing-*GACO Communications Corp.*)

(See also: Candor-*Superior B/cing of Calif.*)

Tariff, Amendment of
(See: Common Carrier, Rate Revision, Authority to Make-*AT&T Co.*)

Tariff, Experimental
(See: Common Carrier, Rate Revision, Authority to Make-*AT&T Co.*)

Tariff, Investigation
(See: Common Carrier, Rate Structure, Inquiry-*AT&T Co.*)

Transmission First Local
(See: Comparative Hearing-*Buena Vista Telecasters of Texas, Inc.*)

(See also: Application, Amendment of, After Designation, Rejected-*Beaufort County B/cing Co.*)

Trustee in Bankruptcy
(See: Bankruptcy-*Kirk Merkley*)

Wide Area Telephone Services (WATS)
(See: Common Carrier, Specialized Services-*AT&T Co.*)

(See: Common Carrier, Specialized Services-*MTS/WATS Market Structure*)

Application, For Review, Time for Filing
Fairness Doctrine
Fairness Doctrine, Refiling of Complaint

Petition for Reconsideration must be timely filed. Followup complaint must be filed within reasonable time (normally within 30 days) after Commission denial of initial complaint.
–*Accuracy In Media*

FCC 83–293

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In re Complaint of
Accuracy in Media
against

CBS TELEVISION NETWORK

MEMORANDUM OPINION AND ORDER

(Adopted: June 23, 1983; Released: June 30, 1983)

BY THE COMMISSION:

1. The Commission has before it an Application for Review of the Broadcast (now Mass Media) Bureau's ruling of September 1, 1982,[1] denying reconsideration, filed September 23, 1982 by Accuracy in Media (AIM). On January 18, 1982, the Commission received a complaint from Mr. Reed Irvine on behalf of Accuracy in Media alleging that the CBS television network had violated the Fairness Doctrine as a result of a November 17, 1981 airing of "The Mike Wallace Profiles: 'Jean Seberg,'" and related news broadcasts. The Bureau, in a ruling of April 15, 1982,[2] found that AIM failed to establish that the broadcasts discussed a controversial issue of public importance. AIM had identified the issue as "whether or not the FBI was responsible in any significant degree" for Ms. Seberg's various problems.

2. In a letter dated May 27, 1982, AIM requested reconsideration of the Bureau's April 15 ruling.[3] The Bureau found that AIM had failed to seek reconsideration within 30 days as required by Section

[1] A copy of this ruling is attached (Appendix A).
[2] A copy of this ruling is attached (Appendix B).
[3] The last sentence of AIM's letter states:

> We therefore ask that you reconsider your rejection of our complaint and consider on its merits whether or not CBS has complied with the requirement

405 of the Communications Act of 1934, as amended (47 U.S.C. §405). Accordingly, the Bureau dismissed AIM's request for reconsideration.

3. AIM now asks the Commission to reinstate its complaint and address it on its merits. AIM asserts that the Commission should accept its May 27 letter as timely filed "because it was a bona fide effort to meet a requirement [establishing a *prima facie* case] in good faith levied on AIM by the FCC staff."

4. After a careful review of the information before us, we believe that the Bureau's ruling is correct, and the Application for Review does not contain sufficient grounds to warrant reversal. The Bureau's dismissal of AIM's request for reconsideration was consistent with the statute and precedent because no extraordinary circumstances have been raised. *Gardner v. FCC,* 530 F.2d 1086, 1091 (D.C. Cir. 1976); *The Ridgewood Group,* 79 FCC 2d 588 (1980).

5. Some further comment is warranted. AIM in its Application for Review stated that its May 27, 1982 pleading was filed in accordance with Commission instructions to provide new information for purposes of establishing a *prima facie* case. This requirement is necessary before the Commission will ask a broadcaster for its comments on a fairness complaint. Although there is a 30-day statutory requirement for filing petitions for reconsideration, we have not previously limited the time within which a complainant could perfect the original complaint so as to warrant an inquiry to the broadcaster. We believe that the lack of some limitation is administratively inefficient and creates an undue burden on our licensees when a "follow-up" complaint is filed long after the initial complaint has been dismissed. Therefore, we will now require complainants to file such "follow-up" Fairness Doctrine complaints within a reasonable time after the date of the Commission's denial of the initial complaint.[4] If this is not done, such complaints will be dismissed as untimely filed. Of course, complainants can elect to seek reconsideration within the statutory guidelines. 47 C.F.R. §1.106. Because we are detailing this policy for the first time, and because AIM may have intended its May 27, 1982 pleading to be treated as a "follow-up" complaint, we shall examine the merits of AIM's allegations contained in its pleadings of January 18 and May 27, 1982.

6. In establishing a Fairness Doctrine complaint there must be a current controversial issue of public importance. The events creating

---

that it air all sides of this controversial issue.

The Bureau appropriately referred to this letter as a Petition for Reconsideration.

[4] Ordinarily, a reasonable time would be within 30 days of the date of the complaint's denial.

the dispute concerning the FBI's alleged involvement in the Seberg matter[5] occurred well over ten years ago. Therefore, even if the degree of FBI involvement was an issue that may have been subject to the Fairness Doctrine in 1970, we cannot find that a broadcaster would be unreasonable in determining that such events at the time of the broadcast did not amount to a controversial issue of public importance. *Frederich P. Berg,* 71 FCC 2d 387 (1978), *review denied,* 71 FCC 2d 385 (1979), *recon. denied sub nom. The Ridgewood Group,* 79 FCC 2d 588 (1980).

7. AIM has furnished numerous newspaper and magazine articles which it contends demonstrates this issue to be controversial. Certainly these articles illustrate the newsworthiness of the Seberg matter, but they do not establish that more than a decade after the disputed events took place the issue of the FBI's alleged interference in Ms. Seberg's personal affairs is subject to vigorous debate with substantial elements of the community in opposition to one another.[6] In this connection, the Court of Appeals in *Healey v. FCC,* 460 F.2d 917 (D.C. Cir. 1972) stated:

> Merely because a story is newsworthy does not mean that it contains a controversial issue of public importance. Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues. [*Id.* at 922.]

8. AIM has asserted that the FBI's involvement in the Seberg matter is important because of its effect on "the reputation of the FBI"[7] and that a "[w]eakening of public respect for the FBI" can damage its ability to function effectively. If, in fact, AIM is suggesting that "the reputation of the FBI" is a separate and distinct fairness issue requiring offsetting viewpoints, we find that AIM has not submitted any information to show that CBS meaningfully addressed this issue during its presentation of "The Mike Wallace Profiles: 'Jean Seberg.'" Under the Fairness Doctrine an issue must

---

[5] See Appendix B for details.

[6] In establishing a *prima facie* case under the Fairness Doctrine, an issue must be both controversial and of public importance. As indicated in the *Fairness Report,* 48 FCC 2d 1 (1974), and in the Bureau's April 15, 1982 response to AIM's January 18, 1982 complaint, in determining whether an issue is controversial "it is highly relevant to measure the degree of attention paid to an issue by government officials, community leaders, and the media. Furthermore, the licensee should be able to tell, with a reasonable degree of objectivity, whether an issue is the *subject of vigorous debate with substantial elements of the community in opposition to one another." Fairness Report,* 48 FCC 2d at 11–12 (emphasis added).

[7] Pursuant to a request from AIM, Mr. Robert Young, assistant director in charge, Office of Congressional and Public Affairs of the FBI, sent to the Commission a letter which we received on June 11, 1982. He asserts that the national publicity surrounding the Jean Seberg matter and its effect on the credibility of the FBI makes this a matter of "public importance." In addition, Mr. Young is of the opinion that the Seberg case is "controversial" as evidenced by the numerous editorials addressing this matter and the countless inquiries received by the FBI.

be addressed in an obvious and meaningful fashion so as to amount to advocacy on that particular issue. *Fairness Report,* 48 FCC 2d at 13; *American Security Council Education Foundation,* 607 F.2d 438, 450 (1979). The Commission does not expect its licensees to present contrasting viewpoints on every statement or shade of opinion presented in a particular program. In this regard, we have stated:

> Clearly the licensee must be given considerable leeway for exercising reasonable judgment as to what statements or shades of opinion do require offsetting presentation. If every statement, or inference from statements or presentations, could be made the subject of a separate and distinct fairness requirement, the doctrine would be unworkable. More important, . . . such a policy of requiring fairness on each statement or inference from statements would involve this agency much too deeply in broadcast journalism. We would become an integral part of broadcast journalism, passing on thousands of complaints that some statement, or inference to be drawn from a statement, on a newscast or other news show had not been offset by a countering presentation. A policy of requiring fairness, statement by statement or inference by inference, with constant governmental intervention to try to implement the policy, would simply be inconsistent with the profound national commitment to the principle that debate on public issues should be "uninhibited, robust, [and] wide-open. . . ." [*National Broadcasting Co.,* 25 FCC 2d 735, 736-37 (1970) (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964)).]

9. Based on all of the foregoing, pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Sep. 1, 1982

8330-D
C6-5

Mr. Reed Irvine
Accuracy in Media, Inc.
1341 G. Street, N.W., Suite 312
Washington, D.C. 20005

Dear Mr. Irvine:

This is in reply to your correspondence filed on May 28, 1982, on behalf of Accuracy in Media (AIM), in which you seek reconsideration of the April 15, 1982 Broadcast Bureau ruling that determined you had failed to establish a *prima facie* Fairness Doctrine complaint.

Your original complaint alleged that the CBS television network, in its November 17, 1981 airing of "The Mike Wallace Profiles: 'Jean Seberg'" and related news broadcasts, had violated the Fairness Doctrine. You defined the controversial issue of public importance as "whether or not the Federal Bureau of Investigation [FBI] was responsible in any significant degree" for Ms. Seberg's various problems. You asserted that CBS had failed to present evidence "(1) that the FBI was not responsible for the publication of the 1970 story about [Ms.] Seberg [concerning her pregnancy], and (2) that the publication of the story was not the cause of her miscarriage or her

subsequent mental problems." The Bureau found this complaint to be deficient because it failed to establish that the issue in question was "controversial" or of "public importance."

Section 405 of the Communications Act of 1934, as amended (47 USC §405), and Section 1.106 of the Commission's rules (47 CFR §1.106) require that petitions for reconsideration must be filed within 30 days from the release of the subject decision. The Bureau's ruling concerning this matter was mailed to you on April 15, 1982, and your petition for reconsideration was received by the Commission on May 28, 1982, well beyond the 30 day statutory filing period. Therefore, since, under 47 USC §405, your petition for reconsideration was untimely filed, and since the Commission has no authority or discretion to change the requirements of the statute, your petition must be dismissed. *See Washington Broadcasting Co.*, 2 FCC 2d 952 (1966).

Mr. Reed Irvine

In view of the foregoing, your petition for reconsideration IS DISMISSED.

Sincerely,

Jeffrey W. Malickson
Assistant Chief
Complaints and Compliance Division
Broadcast Bureau

APPENDIX B

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Apr. 15, 1982

3466
IN REPLY REFER TO:
8330-C
C1–319

Mr. Reed Irvine
1341 G Street, N.W. Suite 312
Washington, D.C. 20005

Dear Mr. Irvine:

This refers to your complaint, filed January 18, 1982, on behalf of Accuracy in Media, Inc. (AIM), in which you allege that in its November 17, 1981, profile of the late Jean Seberg, the CBS television network violated the Fairness Doctrine.

In support, you allege that the program contained numerous charges or suggestions that the Federal Bureau of Investigation (FBI) was responsible for the publication by newspapers and magazines of a story about Ms. Seberg in 1970 which caused her such mental anguish that she had a miscarriage, subsequently became mentally unbalanced, and later committed suicide.[1] You identify the controversial issue of public importance as "whether or not the FBI was responsible in any significant degree" for Ms. Seberg's various problems. In this regard, you assert that CBS did not present any

[1] According to AIM, CBS made five references to an allegation that the FBI was responsible for "plant[ing]" stories in the press stating Ms. Seberg was carrying a baby fathered by Raymond Hewitt, a Black Panther leader.

of the "strong evidence" that: (a) the FBI was not responsible for the publication of the 1970 story about Ms. Seberg, and; (b) the publication of the story was not the cause of her miscarriage or her subsequent mental problems and eventual suicide.[2] You further state that CBS aired a portion of a recording of a telephone conversation between Ms. Seberg and Mr. Hewitt which you allege it edited to make the recording conform to CBS' version of what the recording was about. You declare that "This tampering with the evidence strongly indicates that the CBS effort to portray the FBI in an unfavorable light was not only deliberate but contrived." Moreover, you charge that the documents and tape were made available to the three major networks, major newspapers and the wire services, and that only CBS refused to carry a report mentioning this evidence. In this regard, you contend that CBS produced the November 17, 1981, profile of Ms. Seberg which repeated all the charges against the FBI and ignored all of the exculpatory evidence.

You enclose a copy of a November 27, 1981, letter you wrote to CBS asking that it tell the other side of the Seberg-FBI story. You state that in his December 9, 1981, reply, Mr. William Leonard, President of CBS News, did not address the issue of the omission of all the contrary evidence and did not claim that the other side of the story has previously been or ever will be aired by CBS. We note, however, that you do not enclose a copy of that reply, and thus you have furnished us no evidence in support of these allegations. Nonetheless, you request that the Commission order CBS to present the other side of this "controversial issue."

The First Amendment to the Constitution and provisions of the Communications Act prohibit the Commission from taking any action that would interfere with free speech in broadcasting. Although there are other laws which establish limited exceptions, the authority of the Commission to regulate broadcasting does not, in general, include the right to direct broadcasters in the selection of programming to be aired by their stations. In this context, the First Amendment protects the right of the press, including broadcasters, to air what may be considered biased or offensive by the audience as well as that thought unprejudiced and pleasant. Within this framework, decisions as to what material to broadcast are left to the licensee's good faith judgment as to how best to serve the public interest.

Under the Fairness Doctrine the broadcaster must afford a reasonable opportunity for the presentation of contrasting viewpoints when it presents one side of a controversial issue of public importance. This policy does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcaster has an affirmative duty to encourage and implement the presentation of contrasting views in its *overall* programming which, of course, includes statements or actions reported on news programs.

The Commission's *Fairness Report,* 48 FCC 2d 1, 11–12 (1974), sets forth the factors involved in defining a "controversial issue of public importance." In determining whether an issue is of "public importance," the Commission looks to (1) the degree of media coverage; (2) the degree of attention given the issue by government officials and other community leaders; and (3) the principal test, a "subjective evaluation of the impact that issue is likely to have on the community at large." With respect to whether an issue is "controversial" the Commission states that: "Here, it is highly relevant to measure the degree of attention paid to an issue by government officials, community leaders, and the media." Furthermore, the licensee should be able to tell, with a reasonable degree of objectivity, "whether *an issue is the subject of vigorous debate with substantial elements of the community in opposition to one another.*" (Emphasis added.) In this regard, we note that you have submitted no evidence that any degree of attention was given the issue by governmental officials and community

[2] The evidence consisted of documents and a tape recording from the FBI's file on Ms. Seberg which AIM released at a press conference on August 22, 1980.

leaders, or that the issue had any impact on the community at large. Moreover, you have not furnished any information to establish that the subject issue is the "subject of vigorous debate with substantial elements of the community in opposition to one another." Thus, you have not met the burden of establishing that this issue, which arose over eleven years ago, is either "controversial" or "of public importance."

Accordingly, no further action is warranted on this aspect of your complaint. Should you furnish the necessary information to satisfy the requirements of a *prima facie* complaint, the Commission will give your complaint appropriate further consideration. In this regard, we are enclosing Broadcast Bureau Publication 8330-FD with attachment. These materials will provide you with the necessary information for filing a *prima facie* Fairness Doctrine complaint.

With respect to your allegation that CBS "contrived" elements of this broadcast, please note that the Commission is not the national arbiter of the "truth" of a news event or the judge of the wisdom, accuracy or adequacy with which it may have been handled on the air. Absent extrinsic evidence of deliberate distortion, the FCC cannot properly investigate to determine whether an account or analysis by a commentator is "biased" or "true." By extrinsic evidence the Commission generally means evidence outside the content of the program. This kind of evidence would include testimony, in writing or otherwise, from "insiders" or persons who have direct personal knowledge of an intentional attempt to falsify the news. Of particular concern would be extrinsic evidence revealing orders from the broadcaster, its top management, or its news management to falsify the news.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the date of this letter by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely,

Jeffrey W. Malickson, Assistant Chief
Complaints and Compliance Division
Broadcast Bureau

Computing Device
Equipment Authorization Program
Measurement, Computing Devices
Radio Frequency Device Authorization
Technical Standards

*Memorandum Opinion and Order* adopted amending Part 15 of Rules concerning radio noise emissions measurements for computing devices. This MO&O makes a number of minor changes in the specific instructions contained in the procedure. In addition, the measurement procedures are removed from Part 15 Appendix A and will be published as an FCC Measurement Procedure MP-4.
*–Amendment of Part 15*
GEN. Docket No. 80–284

FCC 83–352

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In the Matter | |
|---|---|
| Amendment of Part 15 of the Rules relating to methods of measurement of radio noise emissions from computing devices | General Docket 80–284 |

### MEMORANDUM OPINION AND ORDER

(Adopted: July 21, 1983 Released: July 26, 1983)

*Introduction:*

1. A *Report and Order* in the above captioned proceeding was adopted by the Commission on February 25, 1981 (46 FR 23240, April 24, 1981), to specify the method of measuring radio frequency emissions from computing devices subject to limits in Part 15, Subpart J. The test procedure was set out in Appendix A of Part 15. A petition for limited reconsideration was filed by the Computer and Business Equipment Manufacturers Association (CBEMA) on May 26, 1981. This *Memorandum Opinion and Order* makes a number of minor changes in the test procedures for computing devices.

2. The requirements for computing devices in Part 15, Subpart J, are designed to control radio frequency interference from digital electronic equipment such as personal computers and coin operated games. The rules specify limits on emissions radiated into space and emissions carried along the power cord of the product. In developing

these standards in FCC Docket 20780, commenters emphasized that determination of compliance with the limits rests heavily on how tests are to be performed and urged the Commission to institute a separate proceeding to adopt detailed measurement procedures.[1] The need for specifying the test methods is particularly important because the vast majority of computing devices are subject only to verification, an equipment authorization procedure performed by the manufacturer, normally without FCC review.[2] Thus the subject proceeding was initiated.

3. The *Report and Order* in the instant docket set forth measurement procedures for computing devices in Appendix A of Part 15, based on extensive study by the computer industry and measurement laboratories. Manufacturers are encouraged to employ these procedures when performing their own tests. Second, the FCC document discusses a number of variations from the standard procedure that may be employed by manufacturers for convenience or to accommodate unique measurement situations, provided of course that it can be demonstrated that equivalent results are achieved. The test procedures were made as flexible as possible to account for the diverse nature of computer products and practical problems one faces in performing emissions tests on such equipment, while still ensuring accurate and repeatable results.

4. CBEMA's petition for limited reconsideration requests a few substantive changes and several amendments for clarification purposes. No responses to the CBEMA petition were received. We believe the action taken herein should relieve most of CBEMA's concerns. In addition to the points raised by CBEMA, we will also discuss several interpretive questions and other matters which have come to our attention in correspondence or in testing equipment at the FCC Laboratory. Before getting to these items, we will first revisit our decision to publish the computing device measurement procedures as an appendix to Part 15.

*Method of Publication of FCC Computing Device Measurement Procedures*

5. Since the time when the *Report and Order* in this docket was adopted, the Commission has had opportunity in other rulemaking proceedings to consider the method of publication of other FCC equipment authorization measurement procedures. Specifically, in the recent rulemaking proceedings concerning TV interface devices

[1] 44 FR 59530. Complete references to the various actions in Docket 20780 are given in Appendix A of Bulletin OST 54, *Understanding the FCC Regulations Concerning Computers,* available from the FCC Consumer Assistance Office, Washington, D.C. 20554.

[2] See Part 2, Subpart J (47 CFR Part 2, Subpart J), for details on the equipment authorization procedures.

(General Docket 79–244) and remote control and security devices (General Docket 20990), the Commission elected to publish the associated measurement procedures as separate documents.[3] This was obviously a different course than was taken in the instant docket 80–284, where the test procedures were appended to Part 15. However, it had become clear that in the long term it would be preferable to publish the test procedures separately so that they may be purchased only by those who need them. Measurement procedures are generally of interest only to a limited audience, and publication of all such documents as appendices to the FCC Rules is an inefficient means of distributing this information. Accordingly, upon review we have decided to remove the computing device test procedures from Part 15 Appendix A and publish them as a separate FCC Office of Science and Technology measurement procedure.[4] FCC Measurement Procedure MP-4 "FCC Methods of Measurement of Radio Noise Emissions from Computing Devices," will be available in the near future from the FCC duplicating contractor.

*CBEMA Petition and Discussion*

6. CBEMA requests clarification of the Commission's position on whether the equipment under test (EUT) is to be configured in a manner which tends to produce maximized emissions, or whether efforts are to be made to find the absolute "worst case" emissions configuration. Various paragraphs of the test procedure are said by CBEMA to be inconsistent on this point. CBEMA objects to those portions of the procedure calling for specific steps to be taken to find the absolute "worst case" configuration, such as shifting cables or reorienting equipment.

7. It appears that the confusion has been caused by the slightly different instructions that appear in paragraphs 4.2.5, 4.5.1, and 6.1 and in the text of the *Report and Order.* To alleviate this situation we are consolidating all the information on EUT configuration into a revised paragraph 4.5.1. The revised paragraph 4.5.1 allows the test engineer considerable discretion to select the EUT configuration likely to maximize emissions, but the rationale and steps taken to arrive at the final selection must be documented in the test report.

---

[3] *Report and Order* in General Docket 79–244 adopted February 9, 1983 establishing requirements for TV interface devices, 48 FR 13029, March 29, 1983; *Report and Order* in General Docket 20990 adopted October 22, 1981, establishing requirements for remote control and security devices, 46 FR 55520, November 10, 1981.

[4] The change in the method of publication is considered to be purely administrative in nature. Accordingly, as provided in Section 553(b)(3) of the Administrative Procedure Act (5 U.S.C. 553(b)(3)), further notice and comment on this change are unnecessary. The significance of the test procedure, as stated in Section 15.840, is that it will be used by the Commission when performing its own tests. This rule Section is not being changed, except to amend the language to clarify that manufacturers may employ alternative test techniques as discussed in the FCC document.

8. CBEMA objects to the requirement in paragraph 4.5.4 that equipment which may be used with a variety of cable lengths must be tested with both long and short cables, because they claim this effectively doubles the required testing. They go on to state that interface cables are often too bulky or rigid to be bundled as called for in paragraph 4.5.4. We have elected to establish a new paragraph 4.5.4.1 to bring together all pertinent information concerning interface cables. The new paragraph 4.5.4.1 does not specifically call for tests with long or short cables. Instead we are calling attention to the need for the test engineer to select cable lengths likely to produce maximum radiation. Disposition of excess cable length that cannot be bundled will be left to the test engineer.

9. Another point raised by CBEMA is that the stated preference in paragraphs 4.1.1 and 6.2 for testing small computers and Class B computing devices at a distance of 3 meters should be deleted.[5] The justification given is that the limits for Class B devices, although specified at 3 meters, were in fact formulated on the basis of a ten meter protection distance. We are providing partial relief by deleting the instruction in 4.1.1 to measure equipment that occupies a volume of less than a meter cube at 3 meters. Thus Class A computers may be tested up to 30 meters away. (The radiated emissions limits for Class A computing devices are specified at a distance of 30 meters.) For Class B computers, since the limit is specified at 3 meters and measurements at this distance are convenient, we will continue to encourage measurements at 3 meters. Measurements at further distances reduce sensitivity because the signal levels are lower, and they add the uncertainty of extrapolating results inwards from further distances. We have shifted the statement concerning 3 meter measurements for Class B computing devices from paragraph 6.2 to 4.2.4.1 to improve organization of the information. It should be noted that despite the stated preference for 3 meter measurements, provision is made to allow testing Class B devices at further distances if justification exists.

10. CBEMA requests clarification of the Commission's position with regard to equipment that was tested and verified before the test procedures were adopted in this docket. Although the Commission at paragraph 57 of the *Report and Order* in this docket stated that equipment verified prior to the effective date (July 1, 1981) of the formalized test procedures need not be retested, CBEMA feels this is inadequate. CBEMA requests that the Commission state *in the rules* that *any* measurements made before July 1, 1981, will be considered as satisfying the verification requirements, provided that they are

[5] The definitions of Class A and B computing devices are given in Section 15.4 of the FCC Rules. Briefly, Class A pertains to equipment used in industrial or business environments and Class B pertains to equipment intended for use in residential environments. Different technical standards have been established for each category. See Sections 15.810 and 15.830 (47 CFR 15.810 & 15.830).

repeatable and consistent with good engineering practice. CBEMA is mainly concerned about measurements of broadband emissions, stating that some manufacturers understood measurements of such emissions might not be required, and others measured broadband emissions but assumed a greater reduction of the measurement instrument readings than ultimately decided upon by the FCC.[6]

11. We believe CBEMA and others are entitled to clarification of this point. We have amended 15.840 to note that we will accept procedures that are repeatable and consistent with sound engineering practice. Naturally the Commission must reserve the right to evaluate the procedures employed for testing a given equipment on a case by case basis. As provided in Sections 15.803 and 15.814(d), in the event that a given equipment is found to cause harmful interference, the Commission will investigate the cause of the problem with the manufacturer, including a review of the verification test data, and take appropriate action to correct the situation.

*Miscellaneous Matters*

12. In a letter dated April 7, 1981, Messrs. Ralph Calcavecchio and Robert F. German, of the International Business Machines Corp. (IBM), explain that their paper, "On Radiated EMI Measurement in the VHF/UHF Frequency Range," referred to in paragraph 34 of the *Report and Order,* was misinterpreted. The *Report and Order* indicated that the subject paper suggests use of a fixed measurement antenna height. To the contrary, the paper does in fact call for antenna height scanning, but instead of scanning from 1 to 4 meters above ground as the Commission proposed, and ultimately adopted, it states that an appropriate scan range is from 0.5 to 1.5 meters.

13. Messrs. Calcavecchio and German make several excellent points in support of their position, but we do not concur that sufficient evidence has been presented to deviate from the traditional 1 to 4 meter scan range. We have reservations about effects on the measurement antenna when it is close to ground e.g., within 0.5 meters of the ground, because the proximity of the antenna to the ground that may lead to erroneous readings. We understand that this question is currently under study by a number a parties. A second concern we have is that the reference antenna—a dipole—could not be used in vertical polarization over such a low scan range due to its physical length. Manufacturers are advised that we view the need to scan over a lower range than 1 to 4 meters as relevant only for measurements in anechoic chambers where ceiling height is

[6] In paragraph 4.2.2. of the measurement procedure, the Commission in Note 4 allowed measurements of power line conducted broadband emissions to be reduced by 13 dB for comparison to the FCC limits. CBEMA had submitted comments suggesting that a 20 dB reduction be allowed. Nevertheless, CBEMA states that it accepts the Commission's 13 dB factor.

a factor. We will entertain requests to use a lower scan height for alternate test sites on a case by case basis.

14. The Commission on April 9, 1981, received a letter from Mr. Al Lavis of the Canadian Department of Communications raising a question about the line conducted emissions measurement procedure. The FCC limits are based on the use of a 50 ohm/50 microhenry (uH) Line Impedance Stabilization Network (LISN). Because of the limited availability of this network, the Commission provided for use of the more traditional 50 ohm/5 uH LISN by setting forth a curve in Fig. 5 which could be used to adjust the results. Mr. Lavis states that the curve is not entirely valid because it assumes that the impedance presented by the EUT to the LISN is negligible, which is not always the case. We do not disagree with Mr. Lavis' observation, but we see no simple way to account for EUT impedance since it will vary from one device to the next. Given that there is a temporary need to provide for use of the 50 ohm/5 uH LISN, we view the FCC correlation factor as a practical, although not exact, solution. We are, however, revising the NOTE under paragraph 5.3 to emphasize that measurements should be made with the 50 ohm/50 uH LISN whenever possible.

15. Spectrum Measurements Corp. and Dash, Straus & Goodhue, Inc., independent measurement laboratories, point out in letters dated December 28, 1982, and February 8, 1983, respectively, that there may be some confusion over the need to connect interface cables when testing certain computers and peripherals. Paragraph 4.5.1 of the FCC measurement procedure states that, when testing a computer or peripheral, interconnecting cabling shall simulate typical application and usage insofar as practical.[7] The question arises as to how this statement applies to computers that can be used either on a stand alone basis or with peripherals. For instance, some computers contain a microprocessor, keyboard, video display and disk memory storage all in one cabinet, which can be functionally used alone. Yet almost all such stand alone computers provide industry standard interface ports to allow the user to add peripherals such as printers, plotters and modems of his own choosing. Apparently, some segments of the industry are testing stand alone computers without interface cables connected to the interface ports and certifying compliance with FCC requirements; however, when other manufacturers use that computer as a host to exercise their peripherals, they find that FCC limits cannot be met because the computer couples excessive radio frequency energy via the interface port onto the interconnecting cable. We are also aware of situations where peripherals have been tested without an interface cable, using

[7] The reason for this is that interface cables are often the primary source of radiation because they behave like an antenna for any radio signals that would otherwise be contained in the computer cabinet.

built-in programs to exercise the device. Here again, the device was stated to comply with FCC requirements yet could not meet the emissions limits when a cable was connected as in normal use.

16. With the considerable discussion devoted to interface cables in the test procedure, we believe we made our intention clear that interface cables must be connected to the available interface ports. Nevertheless, in the new paragraph 4.5.4.1 on interface cables (see paragraph 8, above), we state clearly that interface cables must be connected to at least one of each type port on the host computer or peripheral when tested for FCC compliance. We are also amending the requirements on information to be provided to the user, contained in FCC Rules Sections 15.818 and 15.838, to explicitly require that the user be so advised if shielded cables or other special accessories are necessary to insure FCC compliance. This is implied in the present text of these requirements, which state generally that the user instruction manual must provide sufficient information to insure that the system complies.

17. Another question that has come up periodically, which is also raised by Dash, Straus & Goodhue, Inc., concerns the use of simulators.[8] In paragraph 4.5.4 of the FCC test procedure, the Commission indicated that a simulator could be used to exchange signals with the equipment under test instead of an actual host computer. This provision was made primarily because of the limited availability of complying host computers during start up of the FCC program. However, we have encountered situations where a simulator was used in testing a product intended for exclusive use with a certificated host computer, although the device would not comply when connected to that computer. Accordingly, we are amending 4.5.4 to emphasize that use of simulators should be avoided if possible. If a peripheral is intended for use with a specific host computer it must be tested with that computer.

18. A number of other minor changes to the measurement procedure are made to add greater flexibility, respond to minor points raised by CBEMA or delete duplicate or overlapping instructions. Chief among them are the following:

a. Paragraph 4.2.5 is amended to indicate that preliminary radiated emissions testing is not mandatory.

b. Paragraph 4.7 is amended to allow use of 80 cm test stand heights as an alternative to 1 m, for comity with certain international measurement standards.

c. Information on the test distance in paragraphs 4.1.1, 4.7 and 6.2 are brought together in a new paragraph 4.2.4.1.

[8] The Commission has received and responded to several hundreds of inquiries concerning the rules governing computing devices and test procedures therefor. The correspondence is available for public inspection. Contact the RF Devices Branch, telephone (202) 653-8247.

*Ordering Clauses*

19. Pursuant to the authority contained in Sections 4(i),302 and 303(r) of the Communications Act of 1934, as amended, IT IS ORDERED that effective September 1, 1983, Part 15 IS AMENDED as set out in Appendix A, attached.

20. IT IS FURTHER ORDERED that the FCC measurement procedure for computing devices, heretofore contained in Part 15 Appendix A, is amended as set out in the attached Appendix B, with the procedure to henceforth be published as Office of Science and Technology Measurement Procedure MP-4 "FCC Methods of Measurement of Radio Noise Emissions From Computing Devices."

21. IT IS FURTHER ORDERED that the Petition for Limited Reconsideration filed by the Computer and Business Equipment Manufacturers Association is GRANTED to the extent discussed herein and otherwise is DENIED.

22. For further information about this ORDER, contact Mr. Julius Knapp, Office of Science and Technology, Federal Communications Commission, Washington, D.C. 20554, telephone 202-653-8247.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

47 CFR Part 15 is amended as follows:

1. Section 15.818 is amended by adding a new paragraph (c) to read as follows:

Section 15.818 *Class A Computing Device: Information to User.*

* * * * *

(c) Where special accessories, such as shielded cables, are required in order to meet FCC emissions limits, appropriate instructions on the need to use such equipment must be contained in the user manual.

2. Section 15.838 is amended by adding a new paragraph (d) to read as follows:

Section 15.838 *Class B Computing Device: Information to the User.*

* * * * *

(d) Where special accessories, such a shielded cables, are required in order to meet FCC emissions limits, appropriate instructions on the need to use such equipment must be contained in the user manual.

3. Section 15.840 is amended to read as follows:

Section 15.840 *Computing Device Test Procedures.*

(a) The measurement techniques that will be used by the Commission to determine compliance with the technical requirements in this Subpart are set out in FCC Measurement Procedure MP-4 "FCC Measurement of Radio Noise Emissions from Computing Devices". Manufacturers are encouraged to follow the same procedure that will be used by the FCC. MP-4 also discusses a number of variations from and alternatives to the FCC test method that

manufacturers or others may employ, provided that they can demonstrate that equivalent results are obtained.

(b) Measurements made prior to July 1, 1981, the effective implementation date for the FCC Measurement Procedures, are acceptable for equipment verification provided they are repeatable and consistent with sound engineering practice. Measurements of broadband emissions that are inconsistent with MP-4 need not be redone. However, should a given equipment be found to cause harmful interference, the Commission will take appropriate action as provided elsewhere in this Subpart.

4. Part 15 Appendix A is deleted in its entirety.

APPENDIX B

The *FCC Methods of Measurements of Radio Noise Emissions From Computing Devices* which were formerly contained in Part 15 Appendix A, are amended as follows and will be published as FCC Measurement Procedure MP-4.

1. The Index is amended as follows:

a. Delete paragraph 6.2.1

b. Add new paragraphs:
4.2.4.1 Antenna-to-Test Unit Distance
4.2.4.2 Antenna Height Variation
4.5.4.1 Interface Cables

c. The titles of the following paragraphs are amended:

4.5.1 Test Conditions and Configuration of EUT

4.7 Test Platform

2. In paragraph 1.0, fourth sentence, delete "and units, sub-units."

3. Paragraph 4.1.1 is amended to read as follows:

4.1.1 *OPEN FIELD TESTS*

Measurements of radiated radio noise should be made in an open, flat area characteristic of cleared, level terrain. For details on how to set up a suitable site, see FCC Bulletin OST 55: *Characteristics of Open Field Test Sites*, available from the FCC Consumers Assistance Office, Washington, D.C., 20554. Measurements made by the Commission will be performed on an open field test site.

4. In paragraph 4.2.3, delete the last sentence "Measured data may . . . charts or photographs."

5. Paragraph 4.2.4 is amended to read as follows:

4.2.4 *ANTENNAS*

A calibrated, tuned half-wave dipole antenna is preferred for measuring the level of radiated emissions. Other linearly polarized antennas are acceptable provided the results obtained with such antennas are correlateable to levels obtained with a tuned dipole. The antenna shall be capable of measuring both horizontal and vertical polarizations. Over the frequency range of 30 to 1000 MHz, the Commission will use tuned half wave dipole antennas for compliance testing.

6. A new paragraph 4.2.4.1 is added to read as follows:

4.2.4.1 *ANTENNA-TO-TEST UNIT DISTANCE*

The distance between the EUT and the measurement antenna may be 3 to 30 meters. An EUT subject to a radiated limit at 3 meters shall be measured at a distance of 3 meters, unless impractical because of size of the equipment, location, etc., in which case measurements may be made at a further distance up to 30 meters and the results extrapolated inwards utilizing an inverse distance extrapolation factor (i.e., 20 dB/decade). Equipment subject to a limit at 30 meters may be measured at a distance of from 3 to 30 meters provided that the results are exrapolated to equivalent signal at 30 meters utilizing an inverse distance extrapolation factor (20 dB/decade).

The horizontal distance between the measuring set antenna and the EUT shall be measured from the closest point of the device or system, as determined by the boundary defined by an imaginary straight line periphery describing a simple geometric configuration enclosing the EUT system. All intra-system cables and connecting devices shall be included within this boundary.

7. A new paragraph 4.2.4.2 is added to read as follows:

4.2.4.2 *ANTENNA HEIGHT VARIATION*

The measurement antenna must be varied in height above ground to obtain the maximum signal strength. For measurement distances up to and including 10 meters, the antenna height shall be varied from 1 to 4 meters. Beyond 10 meters the height shall be varied from 2 to 6 meters. These height scans apply for both horizontal and vertical polarization, except that for vertical polarization the minimum height should be increased so that the lowest point of the bottom end of the dipole (or other antenna), at any frequency, clears the site ground surface by approximately 25 cm. At sites other than open field, alternative scanning heights and procedures may be used, provided that it can be shown that equivalent results are obtained.

8. Paragraph 4.2.5 is amended to read as follows:

4.2.5 *PRELIMINARY TESTING AND MONITORING*

It is often valuable to perform preliminary radiated measurements at a closer distance than specified for compliance to determine the emission characteristics of the EUT. At close-in distances it is easier to determine the spectrum signature of the EUT and, if applicable, the EUT configuration that produces the maximum level of emissions as discussed in 4.5.1. A site other than open field may be used for this purpose, but the test engineer should be aware that the alternate site may not produce precisely correlateable results. Where a radio noise meter is used for this spectrum search, it is recommended that either a headset or loudspeaker be connected as an aid in detecting ambient signals and finding frequencies of significant emission from the EUT.

Preliminary testing is optional. However, if preliminary tests are not performed, the steps outlined above (spectrum signature, EUT arrangement) must be accounted for when making tests at the distance used on the open field site.

9. Paragraph 4.4 is amended by adding a second paragraph to read as follows:

4.4 *DATA REPORTING FORMAT*

* * * * *

The justification for selecting a particular EUT configuration as tending to produce maximized emissions must be documented in the test report. The test report should also show precisely how the interface cables were finally arranged when the measurements were made.

* * * * *

10. Paragraph 4.5.1 is amended by adding the sentence "See Figure 1." at the end of the first paragraph and by adding a second paragraph to read as follows:

4.5.1 *TEST CONDITIONS AND CONFIGURATION OF EUT*

* * * * *

The configuration that tends to maximize emissions is not usually intuitively obvious and in most instances selection will involve some trial and error testing. For example, interface cables may be shifted or equipment reoriented during initial stages of testing and the effect on results observed. For large systems with numerous cables, trial and error type tests may better yield to experience and knowledge about the characteristics of the EUT. Only those configurations that are within the range of positions likely to occur in normal use need be considered. In any event, there must be a definite justification for selecting a particular configuration.

11. Paragraph 4.5.4 *INTERFACING UNITS AND SIMULATORS* is amended as follows:

a. A new paragraph is inserted after the first paragraph to read as follows:

Because of the added degree of uncertainty when a simulator is used, such use should be avoided if possible. If a device is designed to be used with a specific host computer or peripheral subject to mandatory compliance, it must be tested with that computer or peripheral.

b. The last paragraph is deleted.

12. A new paragraph 4.5.4.1 is added to read as follows:

4.5.4.1 *INTERFACE CABLES*

It is imperative that interface cables be connected to the available interface ports on the EUT. This includes, but is not limited to, standard interface bus ports (IEEE 488, RS-232C) provided on computers and peripherals. The effect of varying the positioning of the cables must be investigated to find the configuration that produces maximum emissions. The configuration must be precisely noted in the test report.

Interconnecting cables should be of the type and length specified in the individual equipment requirements. If the length may vary, the test engineer should select the length that in his judgment will most likely produce maximum emissions. In general this decision should be based on some trial and error tests. If the cables will be purchased separately by the consumer, and shielded or special cables are used during FCC tests to achieve compliance, then a note must be included in the instruction manual advising of the need to use shielded cables. See FCC rule Sections 15.818 and 15.838.

Excess lengths of cables should be bundled at the approximate center of the cable with the bundles 30 to 40 cm in length. If it is impractical to do so because of cable bulk or stiffness, or because the testing is being done at a user installation, disposition of the excess cable is left to the test engineer.

Where there are multiple interface ports all of the same type, connecting a cable to just one of that type port is sufficient provided it can be shown that the additional cables would not significantly affect the results. Here again, the test engineer must use judgment as to what is appropriate for a particular EUT.

Products that provide a unique interface port for peripherals that are not yet available, may be tested by attaching a cable, extended one meter vertically above the device and left unterminated.

13. Paragraph 4.7 is amended to read as follows:

4.7 *TEST PLATFORM*

An EUT which is normally operated on a table shall be placed on a non-conducting table having a height of 1 meter above test site ground level. For ease of testing, the table may be placed on a rotatable platform, in which case the total height of the table plus the platform shall be approximately 1 meter above test site ground level. If the platform is elevated, it should be non-conducting to the maximum extent practicable.

Measurements made on a test table of 80 centimeter height as called for in some international measurement standards will be accepted for verification or certification of compliance. Although the results will probably be only marginally different than with the 1 meter height, the risk for discrepancies lies with the manufacturer. FCC tests will be performed at a height of 1 meter.

In the event that all the units or peripherals of an EUT system will not fit on the table, one or more of these may be placed on non-conductive shelves below the table top, using the minimum spacing below the top for their placement. In selecting units for placement on the shelf, first preference should be given to those normally not requiring frequent attention.

For an EUT normally placed on the floor, the equipment should, if practicable, be placed on a rotatable platform. If the platform is elevated it should be non-conducting to the maximum extent practicable and have a height of not more than 0.5 meters above ground level. The EUT shall be located in the center of the platform. If the EUT consists of two or more units, these shall be arranged around the center of the platform consistent with actual use.

14. In paragraph 5.1 the first sentence is amended to read as follows:

5.1 *CONDUCTED POWERLINE TEST CONFIGURATIONS*

The EUT shall be placed 40 centimeters from an earth grounded conducting surface 2 meters square (e.g. the floor of the test chamber) and shall be kept at least 80 centimeters from any other earthed conducting surface. Floor standing equipment may of course be mounted on an earth grounded floor.

* * * * *

15. In paragraph 5.3, the NOTE is amended as follows:

a. The first sentence is amended to read "LISN's designed to comply with the impedance characteristic of Figure 2, have limited availability on the market."

b. Another sentence is added at the end of the paragraph to read "The correction has limited validity due to wide variation in EUT impedances, so measurements should be made with the 50 microphenry LISN if at all possible."

16. In paragraph 5.5, a sentence is added at the end of the paragraph as follows: Investigation shall be made to determine whether the position of interface cables affects the test results and if it does, the cables should be positioned so as to produce maximum emissions results.

17. In paragraph 6.1, in the fourth paragraph all sentences except the last one are deleted.

18. Paragraph 6.2 is amended to read as follows:

6.2 *RADIATED RADIO NOISE TESTS*

Radiated radio noise measurements shall be made at one of the test sites described in 4.1, above. The EUT shall be rotated as per 6.1 and measurement antenna height varied as prescribed in 4.2.4.2 in order to obtain a maximum reading on the

measurement instrument. Tests shall be made in both the horizontal and vertical planes of polarization.

The frequency range 30 MHz to 1 GHz shall be investigated. For record keeping purposes only the 6 highest emanations observed during the tests need be recorded and maintained in the permanent record files.

19. Paragraph 6.2.1 is deleted.

20. In paragraph 6.3 the last sentence "Preliminary measurements . . . per paragraph 6.1." is deleted.

21. The curve shown in Fig. 2 "Impedance Stabilization Network" is revised to cover the frequency range 450 kHz to 30 MHz.

Fairness Doctrine
Fairness Doctrine, Complaint, Sufficiency in Overall Programming
Fairness Doctrine, Controversial, Within Overall Programming

Application for Review of a Bureau ruling denying a complaint against CBS television network denied. Complainant has failed to establish that CBS did not present contrasting viewpoints in its overall programming on the issue of "National Defense: do we need less or do we need more?"
–*American Security Council*

FCC 83–292

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In re Complaint of

AMERICAN SECURITY COUNCIL
against
CBS, INC.

MEMORANDUM OPINION AND ORDER

(Adopted: June 23, 1983; Released: July 12, 1983)

BY THE COMMISSION:

1. The Commission has before it an Application for Review of the Broadcast (now Mass Media) Bureau's September 8, 1982 ruling, filed October 7, 1982, by the American Security Council (ASC).[1]

2. The CBS television network broadcast a five-part series entitled "The Defense of the United States" during prime time for five consecutive nights from June 14–18, 1981. The series was rebroadcast in August 1981. On May 26, 1982, ASC filed a complaint alleging that CBS, in its presentation of "The Defense of the United States," had violated the Fairness Doctrine by not presenting contrasting points of view on the issue of "National Defense: do we need less or do we need more?"

3. In its September 8, 1982 ruling, the Bureau found that ASC's entire complaint focused on the lack of contrasting viewpoints presented within the five-part series. The Bureau noted that the Fairness Doctrine does not require a balanced presentation within a

[1] A copy of the ruling is attached as an Appendix. The American Security Council describes itself as "a non-profit educational institution whose purpose is to improve and increase public understanding and awareness of facts and issues relevant to the security and defense of the United States."

single program or series of programs. The Bureau found that the subject series contained contrasting viewpoints and that no information was provided concerning CBS' overall coverage of the issue in question; that ASC's complaint failed to establish the nature and extent of its members' viewing habits in that it did not specify those time periods when its members were "routine" or "regular" viewers; and that ASC had furnished no extrinsic evidence of deliberate distortion by CBS to support ASC's allegations that the subject program contained inaccurate and misleading material. In this connection, the Bureau stated that "the Commission is not the national arbiter of the 'truth' of broadcast programming or the judge of its wisdom, accuracy or adequacy."

4. In its Application for Review ASC asserts that to sustain that part of the Bureau's ruling regarding the showing required to establish the nature and extent of its members' viewing habits "would not only insult common sense but would also require repeal of the Commission's own policy as stated in its *Fairness Report*, 48 FCC 2d 1 (1974), and as set forth in the *Phelps* Doctrine (*Alan C. Phelps*, 21 FCC 2d 12 (1969))."

5. According to ASC, paragraph 52 of the *Fairness Report* defines the appropriate basis for establishing viewing habits in a fairness complaint. Citing this paragraph, ASC asserts that the *Fairness Report* "recognizes the fact that some groups have a particular interest in certain issues and are in a position to state that contrasting views have *not* been presented."[2] ASC thus concludes that its organization "is a specialized group that has a particular interest in the national defense capabilities of the United States and routinely monitors CBS (and others) relative to such matters."[3] Furthermore, ASC asserts that the affidavit submitted by its president, Mr. John Fisher, "precisely" complies with the requirements of the Commission's rules and policies.[4]

6. ASC argues further that where a five-hour prime time program is presented and perceived by its audience "as *the* compre-

---

[2] Paragraph 52 of the Fairness Doctrine states in relevant part:

> Although some groups having a particular interest in a controversial issue and a licensee's presentation of it have monitored such a station for periods of time and thus have been able to offer conclusive evidence that contrasting views were not presented, the Commission realizes that such a requirement for every individual complainant would be an unduly burdensome one. [*Fairness Report*, 48 FCC 2d at 19.]

[3] ASC indicated in a footnote that it has been involved in monitoring CBS since 1973.

[4] The affidavit of John M. Fisher, states in relevant part:

> That in my role as President of the American Security Council and also as a concerned citizen of the United States, I am, and have been in excess of the past five years, a regular and routine viewer of the news, public affairs and other non-entertainment programming carried by the CBS television network.

hensive overview of the state of the National Defense of the United States," the program should be internally balanced. ASC contends that Commission policy should be changed to reflect this principle because under present policy it will never "recognize a need for fairness to be applied to a single series or major project no matter how egregious the unfairness or how important the subject matter."

7. ASC alleges that the Bureau erred in two respects. First, it "did not recognize the unrebutted claim in the ASC [c]omplaint by 'a regular viewer' that the opposing pro-defense viewpoint had *not* been presented in CBS' overall programming." Secondly, ASC asserts that the Commission should have made an inquiry of CBS regarding its overall coverage of the subject issue.

8. Finally, ASC argues "that the Commission must consider not only the substance of the complaint addressed to the broadcaster, but the manner in which it was presented, as well as the manner in which the licensee responds." In this regard ASC characterizes CBS' response to their concern as "on the order of 'drop dead'" and "arrogant." As a consequence, ASC requests the Commission to direct CBS to respond substantively to its concerns.

*Discussion*

9. Having carefully examined the pleadings before us, we conclude that ASC has not presented any new information or additional arguments which would warrant reversal of the Bureau's ruling. ASC has failed to show that in its overall programming CBS did not afford reasonable opportunity for contrasting views. Nor has ASC rebutted the Bureau's finding that CBS presented contrasting viewpoints within the subject series. Therefore, we find that the Bureau was correct in ruling that ASC's complaint did not establish a *prima facie* fairness violation.

10. In reviewing complaints under the Fairness Doctrine, the Commission does not substitute its judgment for that of the broadcaster. Rather, the Commission considers whether the station or network has acted reasonably and in good faith:

> We firmly believe that the public's need to be informed can best be served through a system in which the individual broadcasters exercise wide journalistic discretion, and in which government's role is limited to a determination of whether the licensee has acted reasonably and in good faith. [*Fairness Report*, 48 FCC 2d 1, 9 (1974).]

11. With regard to ASC's allegation that CBS' overall programming was not balanced, in a letter of June 29, 1981, Mr. Bill Leonard, then President of CBS News, stated to ASC:

> "The Defense of the United States" included a variety of viewpoints regarding national defense issues and we believe that the broadcast was fair and accurate. Moreover, CBS News has provided extensive coverage of national defense matters in other news and public affairs programming.

In a subsequent letter of January 22, 1982, to ASC's counsel Howard F. Jaeckel, Assistant General Attorney, CBS Law Department, stated:

> . . . the extensive coverage given to defense matters in the overall news and public affairs programming of CBS news, and our continued belief that "The Defense of the United States" presented a variety of viewpoints on national defense issues fairly and accurately, we respectfully reiterate our rejection of your request for responsive programming.

12. ASC has not presented any new arguments concerning its assertion that the subject five-part series, in itself, should be internally balanced. In fact, in the *Fairness Report* we specifically stated that we did not want to impose on licensees the burden of proving compliance with the Fairness Doctrine on a program by program basis. Instead, we placed the burden on complainants to establish that a licensee's *overall* programming is unbalanced. The pertinent portion of the *Fairness Report,* 48 FCC 2d at 19–20, states:

> We do not believe this requirement [regarding the necessary showing for overall programming] to be unduly burdensome, as contrasted to the heavy burden we would place on all stations if we required them to provide evidence of compliance with the Fairness Doctrine based on complaints which assert that *one* program has presented only one side of an issue.

Therefore, as stated by the Bureau, "the Commission will not examine an individual program or series of programs in determining a licensee's overall good faith compliance with the Fairness Doctrine." *See Democratic National Committee v. FCC,* 460 F2d 891, 905 (D.C. Cir. 1972); *Energy Action Committee, Inc.,* 64 FCC 2d 787, 796 (1977). We are not persuaded to change this precedent since to do otherwise would constitute greater Commission intrusiveness into the content of programming than warranted by our Fairness Doctrine policy. In any event, the Bureau in its ruling of September 8, 1982, found that within the subject series CBS' had presented contrasting viewpoints on the issue of "National Defense: do we need less or do we need more?" (see *infra,* Appendix at note 4). ASC has failed to furnish any material to show otherwise and, therefore, we cannot find CBS to be unreasonable in determining that "The Defense of the United States" contained a "variety of viewpoints."

13. We also agree with the Bureau that the complainant has not sufficiently specified the nature and extent of its viewing habits in terms of indicating those periods of time during which it has been a regular member of the CBS television audience. The relevant portion of paragraph 52 of the *Fairness Report,* which ASC has cited in alleging that it has fully complied with Commission precedent regarding viewing habits, reads as follows:

> [A] claim might be based on an assertion that the complainant is a regular listener or viewer; that is, a person who consistently or as a matter of routine listens to the news, public affairs and other non-entertainment programs carried by the station involved. . . . One example of a "regular" television viewer would

> be a person who routinely (but not necessarily every day) watches the evening news and a significant portion of the public affairs programs of a given station. [*Fairness Report*, 48 FCC 2d at 19.]

However, paragraph 52 also states:

> Complainants should specify the nature and extent of their viewing or listening habits, *and should indicate the period of time during which they have been regular members of the station's audience.* [*Id*; emphasis added.]

In adopting paragraph 52 of the *Fairness Report*, we "did not intend that the mechanical repetition of the words 'regular viewer' or the assertion that the complainant 'routinely listens to the news, public affairs and other non-entertainment programs'" would suffice for establishing a *prima facie* complaint. *See John Howard*, 55 FCC 2d at 780–81. We have clearly stated that our requirements for establishing a fairness complaint are not merely formal. *See John Howard*, 55 FCC 2d at 781 n.2. We expect a complainant to specify the programming he or she has viewed or heard on a particular station or network and to specify what programming, if any, addressed the various contrasting viewpoints on the alleged controversial issue of public importance. In making this showing, a complainant should indicate those time periods when he or she viewed or listened to the station's programming, including the frequency and length of time. This information should initially be brought to the attention of the station to allow it to assess what actions may be appropriate for purposes of complying with the Fairness Doctrine. If a complainant is not satisfied with the station's response and decides to pursue a fairness complaint with the Commission, then this information should be included in the complaint. Our requirement for viewing habit specificity thus serves to allow a licensee and, subsequently, the Commission to determine whether the complainant has sufficiently established that a licensee's overall programming complies with the Fairness Doctrine. We therefore agree with the Bureau's finding that ASC has merely provided a "mechanical repetition" which, in accordance with the Fairness Report, is not an adequate basis for a fairness complaint.

14. ASC asserts that the Bureau is in error for not recognizing ASC's "unrebutted claim" concerning the lack of contrasting viewpoints within CBS' overall programming. ASC bases this allegation on footnote 7 of its May 26, 1982 complaint, which states:

> It is also noted for the record that ASC is aware of no such "other programming" that could be offered by CBS to "balance" *The Defense of the United States* and CBS in its correspondence has offered no such examples.

We note that ASC does not allege that CBS has failed completely to present programming on the issue of National Defense: should we spend more? Instead the foregoing allegation, (which is based on the assumption that the five-part series, in itself, was one-sided) contends that whatever programming CBS has presented on the "more

defense spending" side of the issue would be insufficient for purposes of a balanced presentation. However, ASC presents no persuasive argument or information to support this contention. Under the Fairness Doctrine the complainant has the burden of establishing a specific imbalance in the licensee's overall programming. *Healey v. FCC*, 460 F.2d 917, 921 (D.C. Cir. 1972); *Hale v. FCC*, 425 F.2d 556, 558 (D.C. Cir. 1970). Absent detailed and specific evidence of failure to comply with the Fairness Doctrine, the Commission will not require licensees to disprove bare allegations. *Allen C. Phelps* 21 FCC 2d 113 (1969). *See Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance* 29 F.R. 10415 (1964). In this regard the *Fairness Report*, 48 FCC 2d at 19 states:

> . . . we expect the complainant *to state the reasons* for concluding that in its other programming the station has not presented contrasting views on the issue. (emphasis added)

In the instant case, not only has ASC failed to establish imbalance within the subject series, para. 12 above, but it failed to specify the CBS programming it viewed to support its contention that in its overall programming CBS failed to afford reasonable opportunity for contrasting views. An allegation of unbalanced programming must be supported by a proper showing of viewing habits. As discussed above, ASC did not specify those time periods when it has actually viewed the CBS television network and the frequency of such viewing. Therefore, ASC has presented no information on which to base its allegation that CBS' overall programming presented a disproportionate amount of material on one side of the issue in question. Also, there is no indication it presented such information to CBS. Under these circumstances, we cannot find that ASC has presented a *prima facie* fairness violation.[5]

15. ASC also asserts in regard to paragraph 52 that if a complainant can establish that it is a specialized group with a particular interest and it routinely monitors a network with respect to such interest, this showing would suffice for purposes of establishing the nature and extent of a particular organization's viewing habits. We do not believe this interpretation is correct. The Commission included this language in paragraph 52 of the *Fairness Report* to emphasize that we did not expect all complainants to make the same type of showing that could be made by a specialized group which regularly monitors a station with respect to a particular interest. We did not intend, as ASC has suggested, that this paragraph would allow such a group to circumvent our requirements for specifying their viewing habits by a mere recitation that they are

[5] ACS has also asserted that the Bureau erred by not making an inquiry of CBS. We disagree. Where the underlying allegation on which to base such action does not comply with our policies for establishing a *prima facie* Fairness Doctrine complaint, no inquiry is warranted.

a specialized group with a particular interest. Furthermore, if in fact ASC has been regularly engaged (since 1973) in monitoring CBS with regard to defense programming, then it should have had no problem specifying those periods of time during which it had actually viewed CBS television programming.

16. Finally, with respect to ASC's allegations concerning the unresponsiveness of CBS to its substantive concerns, as we have stated previously, the Commission's role under the Fairness Doctrine is limited to a determination of whether the station or network has acted reasonably and in good faith. *Fairness Report*, 48 FCC 2d at 9. In accordance with Section 326 of the Communications Act of 1934, as amended, and the First Amendment to the Constitution, decisions as to the selection and presentation of program material are left to the journalistic discretion of our licensees. In the instant case ASC has not established a *prima facie* case. Therefore, we cannot find CBS' response to ASC's Fairness Doctrine complaint to be unreasonable.

17. In view of the foregoing, we believe that the Bureau's ruling was correct. Therefore, pursuant to Section 1.115(g) of the Commission's rules and regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
September 8, 1982

IN REPLY REFER TO:
8330-D
C5-734

American Security Council
c/o Robert J. Buenzle, Esq.
1300 Nineteenth Street, N.W., Suite 404
Washington, D.C. 20036

Dear Mr. Buenzle:

This is in response to your Fairness Doctrine complaint (on behalf of American Security Council) against CBS, Inc.[1]

[1] In your May 26, 1982 complaint, you enclosed four exhibits. Exhibit Number 1 is an exchange of correspondence between you and CBS; Exhibit Number 2 contains reprints of two magazine articles; Exhibit Number 3 is a transcript of the five-part series, "The Defense of the United States"; and Exhibit Number 4 is an affidavit of Mr. John M. Fisher, your president.

On July 16, 1982, the American Legal Foundation (ALF) submitted comments in support of your complaint on behalf of its "members and supporters" who viewed the program and who "are regular viewers of CBS." ALF asserts that "the program, 'The Defense of the United States,' was a one-sided presentation of a controversial issue of

You allege that CBS has violated the Fairness Doctrine in its airing of a five-part series entitled "The Defense of the United States."[2] You assert that CBS "ignor[ed] a substantial and important body of opinion on a very controversial issue of public importance *and* further, that the program contained an inordinate amount of factually inaccurate and misleading material." You identify the controversial issue of public importance as "National Defense: do we need less or do we need more?" You assert that this issue is important and controversial because of the extensive amount of disagreement that existed on it prior to the airing of the CBS program and because of the recent media coverage focusing on the issue. You allege that CBS advocated less national defense spending in the program. You also contend that because CBS offered this five-part series as a complete and thorough examination of the entire national defense issue, the program required a more balanced presentation under fairness principles. Finally, you allege that CBS "stone-wall[ed]" your request to have it correct errors in the program and to provide time for some spokesperson to present the opposing viewpoint; that "CBS as a matter of general policy will never voluntarily admit to a mistake or correct an error"; and that CBS' response to your complaint is not consistent with its public interest responsibilities or with "its obligations under the Fairness Doctrine."

In response to your Fairness Doctrine allegations, CBS asserts that "'The Defense of the United States' included a variety of viewpoints regarding national defense issues" and that "the broadcast was fair and accurate." In addition, CBS asserts that it had "provided extensive coverage of national defense matters in other news and public affairs programming."

As you have recognized in your complaint, the Fairness Doctrine requires broadcast licensees to: (1) inform the public by broadcasting discussions of controversial issues of public importance; and (2) afford reasonable opportunity for the presentation of contrasting viewpoints when they present one side of a controversial issue of public importance. In meeting these obligations both sides of an issue need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station or network, because it is the right of the public to be informed which the Fairness Doctrine is designed to assure rather than the right of any individual to broadcast his or her views.

In bringing a complaint under the second part of the Fairness Doctrine, a complainant must establish, among other things, that a licensee or network has failed to afford a reasonable opportunity for the presentation of contrasting views in its *overall* programming.[3]

---

public importance." It defines the issue to be the level of national defense this country needs. ALF asserts that "[t]here has been no coverage of opposing viewpoints on the CBS network in any manner even approximating the coverage the network gave this program." ALF further asserts that American Security Council and ALF have "not been able to identify any coverage of opposing viewpoints on CBS."

[2] You indicate that this series was "originally presented in June of 1981 and rerun in the following month." However, it is our understanding that the series was rebroadcast in August rather than July as you suggest.

[3] In addition to addressing the licensee's overall programming, a *prima facie* complaint should include the following:

(1) the broadcaster (station or network) involved;

(2) the specific issue of a controversial nature broadcast (complainant should include an accurate summary of the views broadcast);

(3) the date and time when the issue was broadcast;

(4) the basis for the claim that the issue was controversial and of public importance;

Your complaint does not present any showing concerning CBS' *overall* coverage of your specified issue. Instead, your entire complaint focuses on CBS' five-part series and the alleged lack of programming *within* it. You provide no information on CBS' programming before or after the broadcasts in question. Absent detailed and specific evidence of failure to comply with the requirements of the Fairness Doctrine, the Commission will not impose on licensees or networks the burden of refuting every Fairness Doctrine complaint. *Allen C. Phelps,* 21 FCC 2d 12, 13 (1969). Within this framework, the Court of Appeals has stated:

> On a complaint under the Fairness Doctrine, the burden is not only on the complainant to define the issue, but also to allege and point specifically to an unfairness and imbalance in the programming of the licensee devoted to this particular issue. It is not enough for the complainant to allege there is a controversial issue of public importance on which the complainant wants to be heard. . . . The essential element in invoking the Fairness Doctrine is that the licensee has not hitherto provided fair and balanced programming on this particular issue, and therefore, and only therefore, can the complainant assert a right for someone to be heard to rectify the existing imbalance. [*Healey v. FCC,* 460 F.2d 917, 921, (D.C. Cir. 1972).]

With respect to the alleged lack of balance within the broadcasts, you request that we implement a new standard for the applicability of the Fairness Doctrine. You assert that where a program is offered "as a complete and thorough examination" on a particular issue, the Fairness Doctrine should require a balancing of contrasting viewpoints within the program or series of programs, rather than looking to the licensee's *overall* programming. We have previously rejected this argument. It would be unduly burdensome on broadcasters to require such individual program balance because it would serve to discourage the broadcast of "robust, wide-open debate." *See Horace P. Rowley III,* 39 FCC 2d 437 (B/c Bur. 1973), *recon. denied,* 45 FCC 2d 1069 (1974); *Fairness Report, supra; see generally The New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). Requiring balanced presentations within a single program or series of programs would not only discourage licensees from addressing controversial public issues for fear of not adequately presenting contrasting viewpoints within each program, but would also create an administrative quagmire for the Commission. The Commission would have to determine on a program by program basis when the treatment of a particular issue would be considered "definitive" for purposes of requiring a balanced presentation. Thus, the Commission will not examine an individual program or series of programs in determining a licensee's overall good faith compliance with the Fairness Doctrine. *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246, 1255 (1949); *James Batal,* 24 FCC 2d 301 (B/c Bur. 1970).

Moreover, in order to avoid interfering with the broadcaster's journalistic discretion in determining how an issue should be covered, the Commission will not attempt a microscopic inquiry into each and every program or series of programs which may address controversial issues of public importance. *See Fairness Report, supra* at 8; *see also CBS v. Democratic National Committee,* 412 U.S. 94, 127 (1973).[4]

---

(5) copies of correspondence between the complainant and the broadcaster; and

(6) whether the broadcaster has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue. *See Fairness Report,* 48 FCC 2d 1 (1974).

[4] Furthermore, even if we were to implement your suggested Fairness Doctrine standard, an examination of the five-part series reveals that CBS presented contrasting viewpoints on the issue of "National Defense: do we need less or do we need more?" In Part III of the series, "Call to Arms," CBS correspondent, Ed Bradley, advocated increased spending for military training, weapon parts and

Your complaint also fails to specify the nature and extent of your viewing habits or indicate those time periods when you have been a regular member of the network's audience.[5] You submit an affidavit indicating that John M. Fisher, president of the American Security Council, has been "a regular and routine viewer of the news, public affairs and other non-entertainment programming covered by CBS television network" during the past five years. Although a complainant does not have to be an "around the clock viewer" of the station to establish himself as a regular viewer of the news, public affairs or other non-entertainment programs, *see Fairness Report, supra,* at 19, a mechanical repetition of the terms "routine" or "regular" with respect to viewing habits, without further particularity, is not an adequate basis for a Fairness Doctrine complaint. *John Howard,* 55 FCC 2d 777, 780–81 (1975); *see also Environmental Defense Fund.* 90 FCC 2d 648 (FCC 82–268, July 9, 1982).

With regard to your allegations concerning inaccurate and misleading material on CBS' presentation, the Commission is not the national arbiter of the "truth" of broadcast programming or the judge of its wisdom, accuracy or adequacy. Some broadcasts (programs or announcements) involve the discussion of controversial public issues, or involve support or opposition to candidates for public office. In these cases, intervention by the Commission would be especially inappropriate because it might create the impression that the Commission is advocating one viewpoint or attempting to judge the truth or falsity of material being broadcast on either side of a controversial issue, or favoring one candidate over the other. Thus, in absence of extrinsic evidence of deliberate distortion, the Commission will not attempt to judge whether statements broadcast on political or other controversial public issues are true or false, or whether a licensee was justified in either broadcasting or rejecting them. The Commission has stated:

> [I]n a democracy, dependent on the fundamental rights of free speech and press, no [g]overnment agency can authenticate the news, or should try to do so. Such an attempt would cast the chill of omnipresent government censorship over the newsman's independence in news judgment. [*Mrs. J. R. Paul,* 26 FCC 2d 591, 592 (1969)]

In view of the foregoing, your complaint is denied.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the date of public notice of this letter (see Commission Rule 1.4(b) [47 C.F.R. § 1.4(b)] by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Commission Rule 1.115 (47 C.F.R. § 1.115).

Sincerely,

Jeffrey W. Malickson
Assistant Chief
Complaints and Compliance Division
Broadcast Bureau

---

skilled personnel salary levels. Also, in Part IV of the series, "The War Machine," Secretary of Defense Weinberger, Senator John Tower and Admiral Kinnear made statements favoring increased spending.

[5] ALF's claims also suffer from the same deficiences.

Cordless Telephone
Equipment Authorization Program
Low Power Communications Device
Radio Frequency Device, Authorization

*Memorandum Opinion and Order* adopted reconsidering a waiver of Rules for a cordless telephone. This MO&O responds to petitions for reconsideration of the waiver Order and reaffirms the Commission's original decision.
*–American Telecommunications Corp.*

FCC 83–358

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In the Matter of

Order granting a waiver of Section 15.7 of the FCC Rules to American Telecommunications Corporation for a cordless telephones

MEMORANDUM OPINION AND ORDER

(Adopted: July 28, 1983; Released: August 5, 1983)

## I. *INTRODUCTION*

1. On September 29, 1982, the Commission adopted an *Order Granting Conditional Waiver* of Section 15.7 for a cordless telephone marketed by American Telecommunications Corporation (ATC), released October 4, 1982 (FCC *Order* 82–430, 48 FR 4788, February 3, 1983). An *Errata* was issued on February 1, 1983 (48 FR 5928, February 9, 1983), correcting some of the technical conditions in the waiver.[1] The instant action responds to three petitions submitted by GTE Service Corp. (GTE): for reconsideration of the *Order*; for reconsideration of the *Errata*; and for stay of the waiver Order. It also responds to a petition for partial reconsideration of the *Order* submitted by Electronics Industries Association, Communications Division, Personal Communications Section (EIA).[2] After reviewing

[1] The changes were made to reflect a correction in the FCC laboratory Report that served as the basis for the technical conditions. See the Report in Project No 2247–56, available from Downtown Copy Center, 1114 21st St., N.W., Washington, D.C. 20037.

[2] A list of the various comments and pleadings filed in this proceeding is given in the Appendix.

these petitions and the comments about them, we have concluded that the waiver order and the technical conditions as corrected in the *Errata* should continue in affect, as specified therein.

2. A cordless telphone uses a short range two-way radio communication link in place of the wire normally connected to the telephone handset, thereby allowing the user freedom of movement. These devices are subject to the provisions of Part 15 of the FCC Rules and are operated without individual license. Most cordless phones on the market today employ a portable handset that transmits in the 49 MHz band, subject to the provisions in Section 15.118 of the FCC Rules, and a base unit (connected to the telephone line) that transmits using carrier current techniques in the band 1.625 to 1.8 MHz, subject to the requirements in Section 15.7. Carrier current refers to a technique whereby an RF signal is coupled to a wire, such as the household AC electrical wiring, which in effect is used as an antenna. Some cordless telephone base units also intentionally couple an RF signal to the telephone line, which then also behaves as an antenna.

3. American Telecommunications Corporation petitioned the Commission for a waiver of the field strength limit in Section 15.7 for the 1.7 MHz carrier current transmitter in its cordless telephone base unit. ATC argued that the limit in Section 15.7 would restrict the operating range to 40 feet or less as compared with the several hundred feet range exhibited by many cordless telephones already on the market. In order to evaluate the petition, the Commission tested a number of cordless telephones and subsequently found that none of the cordless phones tested complied with the field strength limit in Section 15.7. However, the Commission had received only a few reports of interference, and those were caused by cordless telephones operating in the 1.8 to 2.0 MHz amateur radio band.[3] Nevertheless, a potential interference problem was foreseen if cordless telephones would be allowed to continue operating in the 1.7 MHz band. At the 1979 World Administrative Radio Conference, an agreement was reached to reallocate the band 1605 to 1705 kHz for broadcasting.[4] When AM broadcast stations go on the air in this region of the radio spectrum (expected to begin in 1988), cordless telephones may experience substantial interference. In view of these circumstances the Commission decided to grant a limited two year waiver of Section 15.7 to ATC, subject to certain conditions, as an

[3] The frequency of operation of devices subject to Section 15.7 is not restricted. While most cordless telephones were designed to operate between 1.6 and 1.8 MHz, a few models were designed for operation just above this band.

[4] See paragraph 19 of the waiver *Order*.

interim solution while new provisions for cordless telephones could be established in a separate proceeding.[5] The Chief Scientist was given authority to grant waivers to other manufacturers subject to the same conditions.

4. The principal conditions set out in the ATC waiver were: the device must operate in the band 1.625 to 1.8 MHz; the radio frequency current on the power conductors and telephone line may not exceed certain values; manufacture must terminate by October 1, 1984; and, the device must carry a label with a specific text. The limits on radio frequency current were imposed as a simple and convenient way to control the strength of the radiated signal. The values chosen for these limits were consistent with what was exhibited by cordless telephones tested by the FCC Laboratory.

## II. *GTE and EIA PETITIONS FOR RECONSIDERATION*

5. The petitions for reconsideration focus primarily on two issues. GTE Service Corp., an operator of telephone systems and vendor of cordless telephones, argues that the radio frequency current that the waiver allows to be carried on the telephone line will harm the telephone network. This matter is discussed in paragraphs 6 thru 10, below. EIA, representing cordless telephone manufacturers, requests an extension of the waiver termination date. This issue is discussed in paragraphs 11 and 12, below.

### A. *Potential harm to the telephone network*

6. GTE disagrees with the Commission's statement at paragraph 22 of the *Order* that the permitted level of RF energy on the telephone line is not expected to harm the telephone network. The basis for the Commission's statement was that cordless telephones had not been reported to be a source of harm to the telephone network and that the limits on conducted RF energy set out in the waiver were designed to maintain the same levels as exhibited by cordless telephones already on the market. GTE states that the lack of cases of actual trouble should not be interpreted to mean that problems do not exist. According to GTE, the interference caused by cordless telephones is intermittent and disappears before the source can be located.

7. GTE discusses a number of ways cordless phones may harm the telephone network.[6] Apparently the most significant potential

---

[5] A *Notice of Proposed Rule Making* in Docket 83–325 proposing new temporary frequencies for cordless telephones was adopted by the Commission on March 31, 1983, 48 FR 16298, April 15, 1983.

[6] Some of the difficulties GTE describes concern alleged poor cordless phone receiver susceptibility, or lack of security coding in the receiver. The instant proceeding concerns only 1.7 MHz cordless telephone transmitters and problems

problem is interference to T-1 carrier systems.[7] GTE submits the results of tests which purportedly show how T-1 system performance can be degraded by the presence of 1.7 MHz cordless telephone signals on the telephone line. According to GTE, all 48 communication channels served by a T-1 system could be interrupted under certain conditions. Another potential problem described by GTE is that the 1.7 MHz signal can cause a beat note to be generated within an integrated circuit filter chip that is used as a component of central office and subscriber line cards, which results in noise in excess of central office system objectives. GTE states that, because of informal reports, it is also concerned about cross-coupling and demodulation of the 1.7 MHz RF signal by diode circuitry in the telephones of adjacent users.

8. AT&T, in a letter addressed to Mr. Art Wall, Chief of the RF Devices Branch, Office of Science and Technology, concurs with the GTE pleading with respect to potential harm to T carrier systems, but the company offers no actual data to support its concurrence. Also concurring with no factual data is the Computer and Communications Industry Association, representing companies providing data communication services. EIA, on the other hand, states that the problems cited by GTE are new to its members and have not been supported by complaints from either users or other telephone companies. While EIA does not acknowledge the validity of GTE's claims, it is participating in an informal dialog with GTE in order to establish a factual basis from which to proceed. Uniden Corp., a manufacturer of cordless phones, partially supports the GTE petition because it is concerned about the prospect that a few cordless phone designs could cause interference to the telephone network resulting in bad publicity for the entire industry. (Uniden's phones do not intentionally couple RF energy onto the telephone lines.) Mura Corp., another manufacturer of cordless telephones, opposes GTE's petition. Mura states that hundreds of thousands of Mura cordless telephones that couple RF energy onto the telephone line are in use today, and it knows of no complaint of interference to, or degradation of, telephone communications that has resulted from use of its cordless telephones.

9. We consider the GTE test results to be inconclusive for several reasons. The tests were made under simulated conditions and it is questionable whether the tests truly represent what actually occurs in practice. For instance, GTE did not fully account for or investigate

---

associated with the receiver are irrelevant and not discussed herein. Issues concerning cordless telephone receivers are addressed in the proposal for new rules for cordless phones. See footnote 5, *supra*.

[7] T-1 carrier systems convert incoming analog signals, such as voice, into digital form for multiplexing onto transmission lines so that a greater number of channels can be carried on each line. They also reformat and transmit incoming digital signals.

the attenuation that the 1.7 MHz cordless phone signal experiences as it is carried on the telephone line, and GTE states that relevant information on attenuation at this frequency is not available. In certain tests GTE shows how cordless telephones can cause noise in excess of telephone system performance objectives, but it is not clear whether the excess noise is actually significant or whether it could be tolerated. For example, one test shows interference to be caused only when dialing, but since this would occur for only a short duration we might expect this to be a minor problem. It becomes clear in reviewing GTE's tests that the true potential for harm can only be evaluated from a probabilistic standpoint. The probability of harm is a function of a host of variables, such as the number of cordless telephones operating at the same time through the same switching system, the proximity of the cordless phone to the central office, whether the frequency of the cordless phone coincides with the frequency of maximum telephone system susceptibility etc. These factors, together with the facts that only some cordless telephones intentionally place an RF signal on the telephone line and that we are effectively limiting the population of 1.7 MHz cordless telephones by setting a termination date for manufacture of such units, lead us to believe that the chance of harm to the network is minimal, at most speculative.

10. The important factor is the length of time granted to ATC and others for waiver of 15.7. The waiver is intended only as a short term measure. For the Commission to delay a decision in order to seek further information, as GTE suggests in its comments, would serve no useful purpose. Since the GTE test results are inconclusive, we can only rely on the fact that cordless phones of the type in question here have been on the market in quantity for some time and neither GTE nor AT&T have reported cases of actual harm to the network caused by the 1.7 MHz RF signal. We are therefore retaining the limits on RF current set out in the waiver. We reject the GTE request to immediately impose limits on longitudinal and metallic voltage, or alternatively to set some arbitrarily low limit on current on the telephone line.[8] To impose such a restriction would necessitate that manufacturers redesign their cordless telephones when manufacture is already scheduled terminate by October 1, 1984. GTE has not demonstrated nor does experience dictate that such drastic action is warranted.

[8] GTE suggests that the Commission impose the limits on longitudinal and metallic voltage recommended by AT&T in its comments to the *Notice of Proposed Rule Making and Notice of Inquiry* in Common Carrier Docket 81-216, adopted March 26, 1981; released April 10, 1981; 46 FR 22215, April 16, 1981. This proceeding concerns various modifications of the rules in Part 68 concerning telephone equipment registration. The AT&T comments will be addressed in CC Docket 81-216.

B. *Request to extend termination date*

11. EIA requests that the termination date for manufacture under the waiver be changed from October 1, 1984, to two years from such time as the Commission adopts new provisions for cordless telephones. EIA is primarily concerned that adoption of the new rules may for unforeseen reasons be delayed, leaving too little time to design new cordless phones before manufacture of the present 1.7 MHz cordless phones must cease. EIA finds the October 1, 1984, date to be particularly objectionable because that is the time of year when the Christmas marketing season begins.

12. For the reasons already stated in the ATC Order, we believe that the manufacture of cordless telephones at 1.7 MHz must cease as soon as possible. The most important reason is the anticipated expansion of the AM broadcast band. We are therefore expediting a recently initiated proposal for new frequencies for cordless telephones, and we expect to have new rule provisions in place within adequate time for new cordless telephones to be designed and manufactured before October 1, 1984.[9] We have not set any cut-off date for marketing 1.7 MHz cordless telephones, so we fail to see the point of EIA's argument about the Christmas season. Manufacturing and shipping for the Christmas season generally occur before October. Moreover, by the 1984 Christmas season, most manufacturers will have begun to produce and market cordless telephones under the new rule provisions, which we expect to be in place well in advance of that time. We are therefere retaining October 1, 1984, as the date when manufacture under the waiver must terminate.

C. *Miscellaneous matters*

13. GTE states that, instead of requiring a label to be carried on the product, the Commission should merely require information to be carried in the instruction manual. We have already received and granted a substantial number of requests for waiver, and we presume that most manufacturers have already had the required label printed in quantity. A change in the labelling requirement at this time would be disruptive and not serve any useful purpose. We also believe the label on the telephone to be useful to the consumer. Therefore we are not changing this requirement.

14. GTE also asks for clarification on whether the computing device rules in Part 15, Subpart J, apply to spurious emissions generated by digital electronics in cordless telephones. As indicated in Section 15.4(n), the computing device rules do not apply when the product is already subject to specific emissions requirements elsewhere in the FCC rules. Cordless telephone base units generally contain a 49 MHz receiver, which is subject to emissions require-

[9] See footnote 5, *supra*.

ments in Part 15, Subpart C. Thus, the computing device rules do not apply. The 1.7 MHz transmitter may be disconnected during these spurious emission tests.

## III. *ORDERING CLAUSE*

15. In view of the foregoing, IT IS ORDERED that the Petition for Reconsideration of the *Order*, the Petition for Reconsideration of the *Errata*, and the Petition for Stay of the *Order* filed by GTE Services Corp. ARE DENIED.

16. IT IS FURTHER ORDERED that the Petition for Partial Reconsideration filed by Electronic Industries Association IS DENIED.

17. For further information about this proceeding, contact Julius P. Knapp at (202) 653–8247.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

*List of Pleadings/Comments Regarding Petitions for Reconsideration of ATC Waiver for Cordless Telephones.*

9-29-82 *Order Granting Conditional Waiver* to ATC, released October 4, 1982; 48 FR 4788, February 3, 1983.

11-01-82 EIA "Petition for Partial Reconsideration."

11-04-82 GTE Service Corp. "Petition for Partial Reconsideration on Clarification."

11-10-82 EIA "Request for Extension" of time to file comments.

11-16-82 Comment from Keith Olson (amateur radio operator).

11-23-82 Mura "Request for Extension of Time" by attorney Covington & Burling.

11-26-82 EIA Comments.

11-26-82 Mura "Reply to Petitions for Reconsideration."

12-06-82 Correction of Comment from Keith Olson.

12-07-82 GTE Reply Comments.

1-04-83 Comments from Ed. Marriner (amateur radio operator).

1-14-83 "Supplemental Response of Mura Corp." by attorney Covington & Burling.

1-27-83 GTE "Motion to Strike Late - Filed Pleading."

2-01-83 *ERRATA* to ATC Waiver Order issued; 48 FR 5928, February 9, 1983.

3-01-83 GTE "Petition for Reconsideration" (of *ERRATA*).

3-01-83 GTE "Request for Stay" of the waiver *Order* and *ERRATA*.

3-09-83 American Telephone and Telegraph Co. letter dated March 3, 1983 to Mr. Art Wall, Chief, RF Devices Branch.

3-14-83 Uniden Corp. of American request for 2 day extension of time to file comments, by attorney Blum & Nash.

3-14-83 "Opposition of Mura Corp." to GTE petitions for reconsideration and stay, by attorney Covington and Burling.

3-16-83 "Comments of Uniden Corp. of America" by attorney Blum & Nash.

3-16-83 GTE motion to strike Opposition of Mura Corp.

3-21-83 Mura Corp. "Motion to Accept Late-Filed Pleading" by attorney Covington & Burling.

3-24-83 Computer & Communications Industry Association "Reply Comments."

3-28-83 GTE "Opposition to Mura's Motion to Accept Late - Filed Pleading."

3-28-83 GTE "Reply Comments."

4-04-83 Mura letter dated April 4, 1983 correcting its March 14, 1983 "Opposition" by Covington & Burling.

Discovery, Proceedings, Scope of
Privileged Communications

Discovery granted in part and claim of attorney-client privilege disallowed on finding that applicants waived right to assert privilege. Discovery denied with respect to documents protected by attorney-work-product doctrine.
*–A.S.D. Answer Service, Inc.*
CC Docket No. 82-587

FCC 83–277

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| A.S.D. ANSWER SERVICE, INC. | CC Docket No. 82–587<br>File No. 23194-CD-P-(01)–82, *et al.* |
| B.W. COMMUNICATIONS, INC. | CC Docket No. 82–588<br>File No. 23259-CD-P-(01)–82, *et al.* |
| P.A.L. COMMUNICATIONS SYSTEMS, INC. | CC Docket No. 82–589<br>File No. 23168-CD-P-(01)–82, *et al.* |
| VINEYARD COMMUNICATIONS, INC. | CC Docket No. 82–590<br>File No. 23199-CD-P-(01)–82, *et al.* |
| For authority to construct new one-way paging stations in the Domestic Public Land Mobile Radio Service on 34 and 43 MHz frequencies at various locations throughout the United States | |

MEMORANDUM OPINION AND ORDER

(Adopted: June 13, 1983; Released: June 14, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. The *Order Designating Applications for Hearing,* 47 Fed. Reg. 40896, published September 16, 1982, questions whether Graphic Scanning Corporation (Graphic) is the real party in interest in the subject applications, and whether Graphic and Applicants were candid in representations to the Commission with respect to their relationship. The Commission designated real party in interest and candor issues, made Graphic a party to the proceeding, and placed Graphic on notice that the record in this proceeding would be "incorporated in the records of . . . applications of . . . subsidiary corporations of Graphic." Graphic then directed its attorney to conduct an investigation of the facts underlying the designated issues. On November 24, 1982, Graphic, citing Section 1.65 of the Rules, filed a statement which advised the Commission that the investigation ascertained "that Graphic may have inadvertently provided some inaccurate or incomplete information" in response to Commission inquiries. In response to the Respondents'[1] discovery requests for the documents underlying the investigation, Graphic and Applicants submitted a log describing over 400 documents and argued that they are are protected by the attorney-client privilege and the attorney-work-product doctrine. In a pleading filed February 7, 1983, supporting their claim, Graphic and Applicants represented that the November 24, 1982 submission "fully explained the mistakes and inadvertent omissions" which are in issue in this proceeding. Subsequently, pursuant to the ALJ's instructions, the parties discussed the disputed documents, and the number of documents for which exemption is claimed was reduced to 73.

2. In a Memorandum Opinion and Order, 83M-729, released March 3, 1983, the ALJ held that Graphic and Applicants waived their right to assert the attorney-client privilege and attorney-work-product doctrine by the filing of the November 24, 1982 statement and the February 7, 1983 pleading. The ALJ cited *Columbia Broadcasting System,* 45 FCC 2d 119 (1973) (*CBS* ), wherein the Commission held that such an assertion is incompatible with a licensee's duty to be forthcoming with information.

3. The Commission now has under consideration an Appeal of the ALJ's March 3, 1983, Memorandum Opinion and Order, filed March 10, 1983, by Graphic and Applicants, an Opposition filed March 15, 1983, by Respondents, Comments filed March 22, 1983, by the Separated Trial Staff of the Common Carrier Bureau, and a Status Report filed May 26, 1983, by Graphic and Applicants.[2] In the

[1] Respondents are radio common carriers who compete with Graphic and its subsidiaries in numerous media markets, and who have filed applications which are mutually exclusive with the applications that are the subject of the instant hearing.

[2] In addition, the Commission has under consideration a Petition for Stay filed

Status Report, Graphic and Applicants advised the Commission that 35 of the disputed documents had been produced and that three documents were produced in redacted form. In addition Applicants, individually, agree to waive their right to assert the attorney-client privilege and the attorney-work-product doctrine. Graphic, however, continues to claim that the undisclosed documents are exempt from discovery.

4. The primary issue now before the Commission is whether Graphic waived its right to assert the attorney-client privilege and attorney-work-product doctrine, and if so, the extent of the waiver. Graphic argues that under Section 1.65 of the Rules, it was obligated to report all matters of decisional significance to the Commission and that it is well settled that a waiver cannot be inferred from a compulsory disclosure of confidential material.[3] It further argues that there could be no waiver since none of the protected communications were disclosed in the November 24 statement and February 7, 1983 pleading. Graphic also contends that the ALJ in requiring disclosure, improperly relied on *CBS* because that was not a litigated proceeding and the documents were not prepared with an eye toward litigation. The Trial Staff supports the Appeal asserting that the November 24 statement advising the Commission of "corrections" in information filed with the Commission does not constitute a blanket waiver. Respondents argue that Graphic waived its rights and they conclude that there is no basis for overturning the ALJ's determination granting full discovery.

5. The attorney-client privilege protects the confidentiality of attorney-client communications made for the purpose of seeking or giving legal advice. Communications for other purposes, even if between attorney and client, are not protected. Nor is the claim of privilege consistent with the self-serving selective disclosure of confidential documents.[4]

6. Graphic's November 24 statement advised the Commission that its attorney had investigated the facts underlying the designated issues, and that the investigation established that the information furnished in response to the Commission's inquiries may have inadvertently provided some inaccurate or incomplete information. The November 24 statement corrects the inaccuracies and explains them in a self-serving and exculpatory manner. Attached to the statement are 31 selected exhibits which support Graphic's version of the facts underlying the designed issues. Graphic and Applicants then relied on the November 24 statement in their February 7 pleading.

---

March 14, 1983, by Graphic and Applicants, and an Opposition filed March 18, 1983, by Respondents. In light of our action herein, the request for stay will be dismissed as moot.

[3] *In Re Sealed Case,*676 F.2d 793, 817 (D.C. Cir. 1982).

[4] *In re John Doe Corp.*v. *United States,*675 F.2d 482, 489 (2nd Cir. 1982).

7. While we agree with Graphic that confidentiality is not waived by a compulsory disclosure, we reject the argument that the November 24 statement was required by Section 1.65 of the Rules. Section 1.65 requires that applicants keep their applications current. Graphic did not amend or correct any misstatements in its applications. The November 24 submission was clearly a voluntary, self-serving act, filed in response to the designated issues.

8. We therefore find that the November 24 statement and February 7 pleading effectuated a waiver of the attorney-client privilege with respect to the facts garnered in the investigation of the circumstances underlying the designated issues. Graphic can not make a selective disclosure of some facts and documents ascertained and then assert confidentiality and privilege to deny access to the remainder.[5] However, the waiver does not require full disclosure of all disputed documents because most of the documents are further protected by the attorney-work-product doctrine.

9. The attorney-work-product doctrine protects the confidentiality of materials developed in preparation for litigation including the attorney's notes and memoranda of witness statements. Discovery of attorney-work-product "is particularly disfavored because it tends to reveal the attorney's mental processes."[6] Disclosed attorney-work-product "could not qualify as evidence; and . . . would make the attorney much less an officer of the court and much more an ordinary witness."[7] The interests of clients, the legal profession and justice are best served by requiring that an attorney's thought processes be held inviolate. This policy has been protected by the courts[8] and has been incorporated in Federal Rule of Civil Procedure 26(b)(3).[9] This does not mean that all written materials obtained or prepared by counsel with an eye toward litigation are free from discovery. Discovery may be had of relevant and non-privileged facts in an attorney's files when those facts are essential to the preparation of one's case. Moreover, privileged attorney-work-product must

[5] *In Re John Doe Corp.*v. *United States,supra* at 489; *In Sealed Case,supra* at 819–21.

[6] *UpJohn Co.*v. United States,449 U.S. 383, 399 (1981).

[7] *Hickman* v. *Taylor,*329 U.S. 495, 513 (1947).

[8] *UpJohn Co.*v. *United States,supra* at 398; *Hickman* v. *Taylor,supra* at 511.

[9] In pertinent part Rule 26(b)(3) provides:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

be disclosed upon a showing that the party seeking discovery has a substantial need for the materials and is unable to secure the materials or their equivalent by other means without undue hardship.[10] Attorney-work-product is clearly entitled to special protection, and even when disclosure of work product is required, the Courts are obligated to safeguard the mental impressions, conclusions, opinions or legal theories of an attorney.[11]

10. Our holding in *CBS* does not require a contrary result. In *CBS* the Commission required the submission of statements and memoranda of subordinate employees of the licensee, which had been given to counsel during an investigation into alleged misconduct. The Commission found the attorney-work-product doctrine did not attach because, *inter alia,*the requested documents were not generated in the course of preparation for litigation, and that CBS's assertion of the attorney-work-product doctrine was inconsistent with its obligation as a licensee to be forthcoming in response to a Commission inquiry.[12] Here, the disputed documents were generated in the course of preparation for hearing, and they are not requested by the Commission but rather by Respondents in a litigated proceeding.

11. We can not definitively rule on the disclosure of each of the disputed documents because those documents are not before us. We have, however, reviewed the descriptions of the documents submitted in the Appendix to Graphic's and Applicants' February 13, 1983 Memorandum in Support of Claim of Privilege and amended in the May 26, 1983, Status Report, and to the extent practicable, we will rule thereon.

12. The documents in question have been broken down into five broad categories.[13] The first category contains a letter from a prinicpal of A.S.D. to A.S.D.'s attorney and a number of letters from the attorneys for two of the Applicants to their clients. The letters have all been produced and the question of their disclosure is now moot.

13. The second category consists of draft affidavits. A number of these documents contain handwritten notations and editorial changes by counsel. The descriptions of the affidavits do not indicate that they were drafted by counsel. If the affidavits were drafted by potential witnesses who had knowledge of relevant facts, disclosure is warranted. However, any annotations of counsel, conveying

---

[10] *UpJohn Co.*v. *United States,supra* at 398–99; *Hickman* v. *Taylor,supra* at 511; Thus, witnesses' statements drafted by an attorney would not be subject to discovery when the witness is available for depositions.

[11] *UpJohn Co.*v. *United States,supra* at 399–400.

[12] *CBS,supra* at 122–23.

[13] Graphic has asserted a broad claim of exemption without attempting to distinguish which documents are protected by the attorney-client privilege and the work-product doctrine.

mental impressions, conclusions, or legal theories, are protected by the attorney-work-product doctrine and such materials can be purged by the ALJ through *in camera* inspection. If the affidavits were drafted by counsel, they are protected as attorney-work-product, and no basis has been presented for disclosure.[14]

14. The third and fourth categories of documents, are drafts of pleadings filed with the Commission, attorney memoranda, and correspondence between counsel. These documents, which were drafted after counsel were on notice of the impending hearing, are protected as attorney-work-product and are not subject to discovery.

15. The fifth category consists of attorney's statements of services rendered to clients. It is well settled that statements listing the dates and general nature of services performed and for whom they were provided, are not protected by either the attorney-client privilege or the attorney-work-product doctrine.[15] In light of the real party in interest issues these statements could be relevant. However, since the statements also contain descriptions of the topics of conversations and meetings, including those with other attorneys, portions of the statements may be entitled to protection as attorney-work-product. The ALJ should review these communications, *in camera,* and allow examination of relevant unprotected information.

16. ACCORDINGLY, IT IS ORDERED, That the Appeal, filed March 10, 1983, by Graphic Scanning Corp. and Applicants, IS GRANTED, to the extent indicated herein, and in all other respects, IS DENIED.

17. IT IS FURTHER ORDERED, That the Petition for Stay, filed March 14, 1983, by Graphic Scanning Corp. and Applicants, IS DISMISSED as moot.[16]

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

---

[14] A draft affidavit prepared by counsel would not be competent evidence until signed and sworn to, and its use on cross-examination of witnesses, absent such affirmation, would effectively place the attorney in the position of being a witness. *Hickman* v. *Taylor, supra* at 513.

[15] *Colton* v. *United States,* 306 F.2d 633, 636–37 (2nd Cir. 1962), *cert. denied* 371 U.S. 951 (1963).

[16] The *Order Designating Applications for Hearing,* 47 Fed. Reg. 40896, published September 16, 1982, did not specify who could participate in this proceeding as decision making personnel. Such participation will be restricted to personnel specified in Section 1.1205 of the Rules.

Common Carrier, Specialized Services
Rules, Waiver of
Wide Area Telephone Services (WATS)

Petition for waiver of rules prescribing rate structure for use of local transport facilities to originate or terminate interstate or foreign telecommunications granted. Rules had assumed equal interconnection opportunity for all interexchange carriers.
*–AT&T Co.*

FCC 83–287

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Petition for Waiver of Sections 69.1(b), 69.3(e), 69.4(b)(7) and (8), 69.101, 69.111 and 69.112 of the Commission's Rules and Regulations

MEMORANDUM OPINION AND ORDER

(Adopted June 23, 1983; Released June 28, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING

1. On March 17, 1983, the American Telephone and Telegraph Company (AT&T) and the Bell Operating Companies filed an emergency petition for waiver of our Sections 69.1(b), 69.3(e), 69.4(b)(7) and (8), 69.101, 69.111 and 69.112 of this Commission's Rules and Regulations to the extent necessary to enable Bell System Operating Companies that will be divested ("BOCs") to implement transport access charges that are consistent with the Appendix to the *Modification of Final Judgment* ("MFJ") entered in *United States v. American Telephone and Telegraph Co.*, 552 F.Supp. 131 (D. D.C. 1982), *affirmed sub nom, Maryland v. United States*, U.S. (51 U.S.L.W. 3628, decided February 28, 1983). The AT&T petition states that the methods that have been prescribed for the computation of transport charges in the access charge rules adopted by this Commission differ in several respects from the MFJ Appendix requirements for the computation of access charges and that the BOCs would be required to prepare duplicative tariffs based upon different methodologies in the absence of Commission action upon this waiver request. For reasons set forth below we grant a waiver

for a period of one year ending December 31, 1984, and shall permit all telephone companies during that year to impose charges to recover their transport costs that do not comply with the applicable sections of Part 69 of our Rules.

## BACKGROUND

2. In the Third Report and Order in CC Docket No. 78–72, FCC 82–579, released February 28, 1983 ("Access Charge Order"), we adopted a comprehensive plan for recovering the costs of exchange carrier facilities assigned to the interstate jurisdiction through the separations process. Among these costs were those incurred to transport an interexchange carrier's switched interstate traffic between its facilities and the end office through which that traffic originates or terminates. A telephone company may transport an interexchange carrier's traffic between these two locations solely through dedicated trunks or through a combination of jointly used (or common) trunking and dedicated trunks. To recognize the differences between these two alternatives for moving traffic, the *Access Charge Order* allocated transport costs between two access rate elements, Dedicated Transport and Common Transport. The *Order* allocated to Dedicated Transport the costs of the dedicated facilities and equipment used to provide conditioning and interface arrangements between the local carrier's and the interexchange carrier's facilities. Common Transport included the costs of the jointly used trunking and access tandems upon which interexchange carriers might alternatively rely to complete the transport of traffic between their facilities and an end office. The rate structure for each element reflected the manner in which the costs allocated to it were incurred. For the Common Transport element, the Order prescribed a usage and distance sensitive rate structure, *see* 47 C.F.R. § 69.111, while for Dedicated Transport, the charges would be based on the number of voicegrade channels provided to the interexchange carrier and other non-traffic sensitive parameters reflecting the cost of the facilities provided. *See* 47 C.F.R. § 69.112.

3. The MFJ also required that the BOCs file cost-based tariffs for access services. *See* MFJ, Appendix B, Section B. For transport charges, however, it delayed the effective date of this requirement until September 1, 1991. The MFJ required that until that date:

> charges for delivery or receipt of traffic of the same type between end offices and facilities of interexchange carriers within an exchange area, shall be equal, per unit of traffic delivered or received, for all interexchange carriers; provided, that the facilities of an interexchange carrier within five miles of an AT&T class 4 switch shall, with respect to end offices served by such class 4 switch, be considered in the same subzone as such class 4 switch.

MFJ, App. B at para. B(3).[1]

4. In their March 17 petition, AT&T and the BOCs requested that we waive the requirement that they file cost-based rates for common and dedicated transport facilities insofar as this requirement conflicts with the MFJ requirement of "equal charge per unit of traffic delivered or received." They noted that our granting the waiver would enable them to comply with the MFJ, would affect only the charges for the two elements and would increase the transport charges assessed on AT&T by twenty to thirty million dollars.

5. The Department of Justice ("Justice"), the Ad Hoc Telecommunications Users Committee ("Ad Hoc") and seven carriers filed oppositions or other comments.[2] Justice, Satelco and Teltec supported the waiver request while Cincinnati, SNET and SBS opposed the waiver request. Southern Pacific said that a waiver should be granted, but that the waiver should be "carefully limited" to ensure that the BOC tariffs will comply with a correct interpretation of the MFJ.[3]

6. Opponents of the waiver request opposed it for somewhat different reasons. Ad Hoc said that the waiver should be denied because the access charge rules provide a better method of computing transport charges than the method described in the MFJ Appendix. SBS said that the MFJ Appendix methodology is better,[4] and Cincinnati and SNET expressed no opinion with respect to the relative merits of the two methods. SBS, Cincinnati and SNET said that a decision to waive the transport access charge rules for divested BOCs and to retain them for all other exchange carriers would produce an undesirable absence of uniformity in access charges. Those carriers recommended that we deny the waiver petition and use proceedings relating to petitions for reconsideration of our decision adopting the access charge rules as a vehicle for

---

[1] The "five mile" requirement is similar to one imposed in the Access Charge Order to reduce the competitive advantage AT&T enjoys over other interexchange carriers because of the location of some of its switches. *See* 47 C.F.R. 69.112(c).

[2] Cincinnati Bell Inc. ("Cincinnati"); Satelco Incorporated ("Satelco"); Satellite Business Systems ("SBS"); Southern New England Telephone Company ("SNET"); Southern Pacific Communications Company ("Southern Pacific"); Teltec Savings Communications Co. ("Teltec"); and Tel Systems Management Corporation ("Tel System").

[3] SPC urged us to limit the waiver to assure that transport charges continue to reflect the cost difference of the varying types and qualities of access that are now and will in the future be offered to interexchange carriers. *See* SPC Comments at 9–17.

[4] SBS explains that, under the Commission's transport rules, the OCCs could be forced to pay potentially much higher rates to cover the costs of designing and constructing the new parallel transport system that the BOCs plan to build to comply with the MFJ's requirement that they offer equal exchange services to all interexchange carriers. *See* SBS Response at 2,4. Because of the direct trunks, "left over" from its past monopoly control over the local network, that link its toll switches to end offices, AT&T, however, will largely escape such charges.

determining the appropriate transport charges for all exchange carriers.

7. The AT&T Reply stated that an industry-wide waiver is "not essential," but that it would not object to such an action "if the Commission believes that it can grant the industry-wide waiver on the basis of the Comments . . . " (Reply, p. 2, note * * *). AT&T adds that its waiver request should be granted because "prompt Court approval of AT&T's Proposed Plan of Reorganization hinges on an expeditious grant of the Emergency Petition . . . . " (*Id.* at 2–3.)[5]

## DISCUSSION

8. This Commission may waive any provision of our rules "on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3. An applicant for waiver must clearly demonstrate that the general rule is not in the public interest when applied to its particular case and that the grant of the waiver will not undermine the public policy served by the rule. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). We are unconvinced that AT&T itself has made the clear demonstration required to justify the relief it seeks. The entire record in this waiver proceeding, however, convinces us that we should suspend the provisions of the rules setting charges for the dedicated and common transport access elements for a short period during which we shall determine the extent to which delays in equal interconnection opportunities for all interexchange carriers justify some departure from a cost-based rate structure for these elements.

9. The OCCs note that our access charge plan will immediately cause substantial increase in OCC costs without a concomitant improvement in their interconnection options.[6] The transport rules were in fact proposed on the assumption that interexchange carriers would from the outset have the ability to choose the kind of transport facilities (*i.e.*, dedicated or shared) that they would be offered. If, based upon economic considerations, an interexchange carrier concluded that it preferred dedicated transport facilities to carry its traffic to a particular end office, it could order such facilities and then should expect to bear the cost of such facilities. We have, however, only recently begun the rulemaking proceeding through which we anticipate extending to independent telephone

[5] The Department of Justice has conditioned its approval of the proposed reorganization plan upon our granting the requested waiver of our transport rules.

[6] In their petitions for reconsideration of the *Access Charge Order*, filed on April 14, 1983, SBS and SPC have renewed the arguments they have already presented in this proceeding. While admitting that our transport rules might be reasonable if all carriers had the option of equal interconnection, they claim that with existing interconnection arrangements determined by a network design reflecting AT&T's historical monopoly of toll traffic, the cost-based charges mandated by these rules unfairly penalize the OCCs.

companies the equal interconnection obligations that the MFJ has imposed upon the BOCs. *See Notice of Proposed Rulemaking* in CC CR re: release Docket No. 78–72, Phase III, FCC 83–178, released May 31, 1983. It has also become apparent that even within BOC territory the choice of transport facilities may not be available. Therefore, the OCCs will remain unable to choose the routes their traffic travels through the local network or the facilities used to carry that traffic. Under these circumstances, imposing cost-based transport charges could have anticompetitive effects if AT&T, because of its past control over local network design, pays relatively less for comparable interconnection. Until interexchange carriers have the flexibility we anticipated their having in the *Access Charge Order*, we conclude that the rules governing transport charges imposed by any telephone company should be modified to reflect the existing interconnection choices of interexchange carriers.[7]

10. Having concluded that a change should be made in the transport charge rules of Part 69, we must now determine the most appropriate and expeditious way to proceed. SBS had recommended that we review our transport rules in the now pending reconsideration proceeding in Phase I of CC Docket No. 78–72. In order for 1984 access tariffs to reflect any modifications to Part 69 that we may make on reconsideration, we must, and expect to, complete our reconsideration proceeding shortly. We believe that more time is required for us to be able to determine the transport rate structure that will best meet the goals of this docket. We would also find helpful comments that discuss this issue in light of the additional information, available only since we adopted our *Access Charge Order*, concerning how the BOCs propose to satisfy the MFJ's equal interconnection requirements. For this reason we are granting a waiver until December 31, 1984, of the rules prescribing the rate structure for Dedicated Transport and Common Transport.[8] Accordingly, telephone companies shall recover the costs allocated to the

[7] We agree with the Cincinnati-SNET-SBS view that it would be unwise to follow a course that results in different access elements and associated rate structures for divested BOCs and other exchange carriers. A considerable degree of uniformity in access charge elements and rate structures is essential to the success of our access charge scheme and must be viewed as one of the paramount purposes of the access phase of CC Docket No. 78–72. If the MFJ Appendix methodology is preferable to the methodology described in the access charge rules, that methodology should be imposed upon all carriers. If the MFJ Appendix methodology is not preferable, it should not be imposed upon any of them.

[8] One issue before us on reconsideration of the Access Charge Order concerns upon whom carrier's carrier charges, including transport charges, should be assessed. The action we take today in no way prejudges that issue, but affects only the 1984 rate structures for the Common Carrier and Dedicated Transport elements. This waiver may in fact be affected by the outcome of the reconsideration proceeding. Until our reconsideration of the *Access Charge Order* is completed, however, carriers should proceed in their tariff preparation assuming that the waiver is in effect.

Dedicated Transport and Common Transport elements by Subparts D and E of Part 69 by filing 1984 access tariffs that comply with our general tariff requirements instead of following Sections 69.111 and 69.112[9] In the exchange carrier association's tariff such charges shall replace charges for the Dedicated Transport and Common Transport elements. Companies electing for 1984 to cross-reference an association charge for any carrier's carrier access element other than the Carrier common Line element or elements and the transitional surcharges must cross-reference the association's charges for transport. The waiver does not, moreover, alter the requirement that telephone companies participating in extended area agreements either file a joint tariff for all traffic sensitive elements or concur in the association tariff for these elements.[10] See *Access Charge Order* at paras. 321–22.

11. Accordingly, IT IS HEREBY ORDERED, That pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, As Amended, 47 U.S.C. 154(i) and (j), and Section 1.3 of the Commission's Rules, 47 C.F.R. 1.3, the Emergency Petition for Waiver filed by the American Telephone and Telegraph Company and the Bell System Operating Companies is GRANTED to the extent reflected herein and is OTHERWISE DENIED.

12. IT IS FURTHER ORDERED, That Sections 69.111 and 69.112 of the Commission's Rules, 47 C.F.R. §§ 69.111–112, shall not apply to access service tariffs filed by or on behalf of any telephone company for the period ending December 31, 1984. A waiver of Sections 69.1(b), 69.4(b)(7) and (8), and 69.101, 47 C.F.R. §§ 69.1(b), 69.4(b)(7)-(8), and 69.101, shall also be in effect during this period to the extent that these sections compel compliance with Sections 69.111 and 69.112.

13. IT IS FURTHER ORDERED That the Secretary shall cause this *Memorandum Opinion and Order* to be Published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

---

[9] Compliance with MFJ criteria is not one of the standards that we shall require an access charge tariff to satisfy. Compliance or noncompliance is an issue to be resolved by the court. Our action today, however, should leave AT&T and the BOCs with sufficient flexibility to meet both MFJ criteria and the standards imposed by the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, and Commission rules and regulations.

[10] In their petitions for reconsideration of the Access Charge Order several parties have asked us to reconsider imposing this requirement. *See, e.g.*, petitions for reconsideration filed by AT&T, Centel Corporation, GTE and Rochester Telephone Company. We shall address the issue shortly in that reconsideration proceeding.

Common Carrier, Rate Revision, Authority to Make Message Telecommunications Service Tariff, Amendment of Tariff, Experimental

Memorandum Opinion and Order adopted denying petitions to reject or suspend and investigate and permitting AT&T to conduct an experiment with its MTS rates in the trial states of New York, California and Iowa to expire on December 31, 1983. *–AT&T Co.*

FCC 83–288

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| In the Matter of | |
|---|---|
| AMERICAN TELEPHONE AND TELEGRAPH COMPANY | Transmittal No. 14251 |
| Revisions to Tariff F.C.C. No. 263 Message Telecommunications Service (MTS) | |

MEMORANDUM OPINION AND ORDER

(Adopted: June 23, 1983; Released: June 29, 1983)

BY THE COMMISSION: COMMISSIONERS FOWLER (CHAIRMAN), QUELLO, RIVERA AND SHARP, WITH COMMISSIONER DAWSON CONCURRING IN THE RESULT AND COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER RIVERA ISSUING A SEPARATE STATEMENT.

1. The Commission has before it the above-captioned tariff revisions filed by the American Telephone and Telegraph Company (AT&T) scheduled to become effective June 25, 1983. These tariff revisions would implement, on a limited trial basis, fifteen Long Distance Message Telecommunications Service (MTS) Optional Calling Plans. These plans apply only to direct dial interstate calls originating from selected central office codes (NXXs) in California, New York and Iowa during selected rate periods and terminating in the United States, Hawaii, Alaska, Puerto Rico, or the U.S. Virgin Islands. AT&T projects that less than one-half of one percent of MTS customers would be encompassed in the experiment.

2. Petitions seeking rejection or suspension and investigation of these tariff revisions were filed by Satellite Business Systems (SBS), Southern Pacific Communications Company (SPCC), Teltec Saving Communications Co. (Teltec), and U.S. Telephone, Inc. (U.S. Tel). A

petition filed by the Association of Long Distance Telephone Companies (ALTEL) seeks partial rejection of the tariff. For the reasons discussed below, we deny the petitions and allow the tariff revisions to become effective.

## I. *BACKGROUND*

### A. *Application For Special Permission To Conduct MTS Rate Experiments*

3. On March 14, 1983, AT&T submitted Application No. 1724 requesting special permission to file tariff revisions without the usual economic support material required by Section 61.38 of the Commission's rules, and to become effective on less than 14 days' notice, instead of the 90 day notice period set out in Section 61.58.[1] AT&T stated that the purpose of this experiment would be to examine customer demand and the impact of the calling options on network utilization, efficiency, and costs and revenues before implementing the plans nationwide.

4. The proposed tariff revisions would introduce on an experimental basis three types of optional calling plans, each offering a choice of five different rates levels for long distance direct dialed calls. These plans, designated the Linear Plan, the Tapered Plan, and the Block-of-Time Plan, would offer customers additional rate reductions for long distance calls made during the evening, night

[1] AT&T also submitted Application Nos. 1720, 1721, 1722, and 1723 on the same day requesting special permission to file tariffs that would expand its satellite, digital and international private line services without accompanying economic support material and to become effective on not less than 14 days' notice. On March 31, 1983, the Bureau waived the provisions of Sections 61.38 and 61.58 allowing AT&T to file revisions to Tariff F.C.C. Nos. 267 and 268 that would add new digital city serving areas without economic support data and to become effective on not less that 14 days' notice. *See* Special Permission No. 83–181. On April 8, 1983, Application Nos. 1720, 1722, and 1723, involving new service offerings and a rate change, were consolidated for action. *See* Special Permission No. 83–208. The Bureau waived Section 61.58 to allow the tariff revisions to become effective on not less than 45 days' notice, but pointed out that AT&T had not documented any specific circumstances that usually warrant waiver of the 90 day notice period. The Bureau acknowledged, however, that the Commission is attempting to create a regulatory environment for all carriers that encourages innovation and efficiency, eliminates unnecessary paperwork requirements, and allows carriers to react quickly in the market place, while maintaining the control necessary to achieve the objectives of the Communications Act. Furthermore, the Bureau pointed out that the Commission is now considering reducing the current 90 and 70 day notice periods to 45 and 35 days, respectively, for all carriers, and therefore granted the notice waiver on that basis. The Bureau declined, however, to waive the economic support material requirements of Section 61.38. It stated that AT&T had failed to show good cause for such a waiver in its applications, and that it was not eligible for non-dominant treatment under the Commission's rules as they now stand. The Bureau indicated that the requisite economic support material for the proposed tariffs need not necessarily be extensive so long as the submissions are sufficient for review purposes.

and weekend rate periods. The optional calling plans would be available to customers in four wire centers within the trial states of New York, California, and Iowa.

5. The 15 experimental rate discounts differ according to customers' long distance calling patterns. Generally, customers with the heaviest long distance calling during the evening, night and weekend rate periods would receive the largest rate discounts. Under the Linear Plan, subscribing customers would pay a monthly charge entitling them to receive an additional uniform percent discount off the existing distance-sensitive MTS rate structure for the night and weekend rate periods. Under the Tapered Plan, subscribing customers would pay a monthly charge entitling them to receive a special usage rate for the first hour of calling each month during the evening, night and weekend rate periods. Usage in excess of one hour would be billed at a somewhat lower special hourly usage rate. Customers using less than a hour would be charged the appropriate fraction of the hourly rate. The rate structure for the Tapered Plan is not distance sensitive.[2] Customers subscribing to the Block-of-Time Plan would pay a monthly charge entitling them to receive an initial allotment of either one or two hours of monthly usage during the night and weekend rate periods. This plan differs from the Tapered Plan in that a monthly usage allotment is included as part of the monthly suscription charge. Customers would not receive a reduction in the subscription charge if usage is less than the monthly allotment. The rate structure for the Block-of-Time Plan also is not distance sensitive. AT&T stated that it expected to continue the experiment "until sufficient data are gathered to develop satistically reliable projections of the experiment's impact."

6. In support of its request to file the experimental tariff provisions on short notice, AT&T stated that waiver of the 90 day notice period would allow customers to participate in optional calling plans substantially sooner. Regarding its request to file the tariff without the usual economic support data, AT&T contended that the experimental nature of the proposed service offerings makes it difficult to prepare detailed information as to demand, revenue and cost of service. Moreover, AT&T argued that the very purpose of the experiment is to permit them to evaluate customer response and ascertain the effects of the calling plans on efficiency and costs and earnings, if offered nationwide.

B. *Bureau Waiver of Sections 61.38 and 61.58 and Request for Supplemental Documentation of the MTS Rate Experiments*

7. On April 8, 1983, the Bureau granted AT&T's Application No.

[2] AT&T states that the rate structure for this plan is not distance sensitive because the "marginal cost of providing service during off-peak periods is relatively insensitive to distance."

1724 and permitted the carrier to file the experimental tariff without economic support data and to become effective on not less than 45 days' notice.[3] In this letter, the Bureau stated that it found good cause to waive the usual 90 days' notice period because the rate plans were a limited offering and a short notice period would indeed permit customers to participate far sooner. Regarding the waiver of Section 61.38 support data, the Bureau stated that a relaxation of this requirement is warranted where it can be shown that an experimental rate plan is soundly designed and has a worthwhile purpose. The Bureau then listed a number of concerns that it had with the rate experiment as described, and stated that if it was satisfied that the experiment is valid, after reviewing the requested supplemental information, it would allow the Section 61.38 waiver to stand. Finally, the Bureau stated that previous off-peak rate reductions have been introduced as general service offerings on a nationwide basis without the need for prior experimentation and asked AT&T to consider whether alternative research techniques could be used to test customer response to various rate plans before proceeding with the proposed experiment.

8. The Bureau stated that it was unable to determine from the information submitted in Application No. 1724 how the results of the experiment could be used to develop a nationwide MTS offering. The Bureau said it was particularly concerned about the sampling technique. It noted that the sample customer base was not randomly selected and was too small to offer statistically reliable results upon which to base a general service offering. Furthermore, there was concern about the demographic profile of the sample as compared to the universe of MTS users.

9. The Bureau also pointed out that the current MTS discount rate structure includes rate period specific billing (RPSB) procedures to prevent a call originating in a reduced rate period from continuing into a full rate period without a corresponding change in the charge. Under RPSB, if a call is placed in one rate period and continues into another, the rate is based on the actual number of minutes in each time period. As described, the experimental rate plans did not fully include RPSB. The Bureau asked AT&T to explain how this billing inconsistency might affect the results of the experiment. The Bureau also questioned why full business day rates were excluded from the experiment and asked to what extent AT&T would consider the overall public switched network (PSN) efficiency when evaluating the effectiveness of the rate plans.

10. Last, the Bureau expressed concern that no expiration date for the experiment had been stated, and specified that AT&T select a reasonable period within which to complete the study.[4] Without an

[3] Special Permission No. 83–218.

expiration date specified in the tariff, the Bureau noted that the rate experiment could evolve into another MTS offering that would place unreasonable financial burdens on MTS rate payers not eligible for discounts.

C. *AT&T's Response to the Bureau and Filing of Tariff Revisions To Implement the MTS Rate Experiments*

11. On April 18, 1983, AT&T filed revisions to Tariff F.C.C. No. 263 that would implement the fifteen experimental MTS rate plans, essentially as proposed in its Application No. 1724, and responded to the Bureau's request for supplemental documentation. First, AT&T specified December 31, 1983 as the termination date for the experiment, unless cancelled or extended by subsequent filing. AT&T then responded to the concerns expressed by the Bureau. Addressing the Bureau's threshold problem, AT&T maintained that the rate experiment was necessary. It stated that this rate experiment is distinguishable from previous off-peak rate reductions because three elements of the experiment—the monthly subscription fee, distance insensitive rates, and the large percentage of rate reductions—are completely new concepts for both AT&T's customers and the PSN. AT&T states that an experimentation period is necessary to assess the impact of these major changes in its service offerings. Furthermore, AT&T contends that this type of experiment, which is designed to test actual purchase behavior, is necessary to complement and quantify market research data obtained by survey techniques.[5]

12. AT&T then addressed the specific questions directed by the Bureau toward its sampling technique and how results obtained by this method could be used reliably to develop a nationwide offering. AT&T responded that its sample size is adequate to permit accurate statistical assessment within each trial area.[6] It stated that it could reliably extrapolate the results obtained within each trial area to structure a nationwide offering by using this data in conjunction with a statisticlly valid description of the entire residence market obtained from a data base of 75,000 nationwide residence customers. AT&T stated its belief that the lack of random selection of trial areas in this experiment would not affect its ability to develop nationwide projections. Moreover, AT&T said that it planned to conduct several phases of market research that would enhance the use and projectability of the experimental data. It elaborated on its ability to use

[4] We note here that previous experience with two experimental tariff filings has been less than satisfactory with regard to time constraints as each continued for about 15 years. *See* AT&T-GTE Satellite Corp. (Picturephone), 70 F.C.C. 2d 1358 (1979), and AT&T Company, (Dataphone 50), 66 F.C.C. 2d 677 (1977).

[5] AT&T stated that it tested customer response to the optional calling plans by conducting extensive survey research on a nationwide scale in 1982.

[6] Each trial exchange area has a minimum of 5000 residential customers.

individual customer tracking systems to provide specific usage data, demographics and subscription patterns.

13. Regarding the issue of rate period specific billing, AT&T stated that the rate experiment does not provide for this procedure because substantial work effort would be required to redesign the billing system to accommodate it, and this expenditure of resources would be inappropriate given the limited nature of the experiment. It pointed out that its customer specific tracking capability will allow for identification and adjustment of the effects, if any, of the lack of rate period specific billing for customers participating in the experiment. AT&T stated its intention to study methods of including rate period specific billing in a nationwide service offering.

14. Finally, AT&T explained why it excluded experimentation with full business day rates and how it would use the results of this study to assess network efficiency. AT&T stated that although it is reasonable to assume that the experiment could include rate discounts for calls made during the business day period, that this would require an extensive evaluation of the revenue and cost implications to the business market and it does not have the necessary data base of business users necessary to conduct this evaluation. AT&T indicated that it might develop such a data base in the future and then be able to experiment with discounts during the business day rate period. Addressing the network impact issue, AT&T stated that it will develop an actual and statistically projectable profile of demand changes to the network from each of the proposed trial plans. It will evaluate each of the demand profiles in terms of network costs and efficiency and will measure these factors against customer preferences and revenue impacts to develop a final rate plan or plans.

## II. *SUMMARY OF PETITIONERS' CONTENTIONS AND AT&T'S REPLY*

15. Generally the petitioners challenge the filing of the experimental tariff without economic support data and contend that AT&T failed to respond adequately to the Bureau's concerns about the design of the experiment and the reliability of the results for structuring a nationwide service offering.

16. The petitioners argue that the absence of cost support data is at odds with the Commission's directives concerning dominant carriers as set forth in the *Competitive Carrier Rulemaking*.[7] U.S. Tel and SPCC maintain in that the lack of cost justification for the tariff

[7] CC Docket No. 79–252, In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Order on Reconsideration, FCC 83–69, adopted February 17, 1983, released March 21, 1983; Second Report and Order, 91 F.C.C. 2d 59 (1982); Further Notice of Proposed Rulemaking, 84 F.C.C. 2d 445 (1981); First Report and Order, 85 F.C.C. 2d 1 (1980); Notice of Inquiry and Proposed Rulemaking, 77 F.C.C. 2d 308 (1979).

proposed threatens universal service because costs will be recovered from users other than those taking the service, and the longer interstate calls will be subsidized by shorter interstate calls. They argue that the experiment is unreasonably discriminatory because the discounted rates would be subsidized by those customers not selected to participate. They believe that if AT&T is allowed to escape cost based pricing, as a dominant carrier, it will have great potential to conduct predatory pricing. SBS notes that the optional plans include rates that are lower than off-peak rates for AT&T's Wide Area Telecommunications Service (WATS), and therefore cost data should be required. Teltec contends that the rate experiment is unlawful because it appears that it will be conducted below cost and will have anticompetitive effects contrary to the Commission's policies. Teltec states that the low rates will produce unrealistic demand results which can not validly support a lawful service offering.

17. U.S. Tel and SBS argue that AT&T will use the experiment to enhance its competitive position in a post-divestiture world. SBS further states that the other carriers are not in a position to conduct similar experiments.

18. All the petitioners argue that AT&T's supplemental documentation fails to demonstrate that the experiment is soundly designed and that the results will be reliable. U.S. Tel states that AT&T has not shown that the sampling frame would be reliable for a nationwide MTS offering, and points out that AT&T concedes that it must link the results with other research data before it could design a nationwide offering. SPCC argues that the sample is deficient because AT&T selected only those trial areas where there are competitors.

19. The petitioners argue that AT&T has failed to demonstrate adequately why rate period specific billing could not be incorporated into the optional plans. U.S. Tel would have AT&T compare costs of the customer specific tracking procedures it plans to use during the experiment with the costs of incorporating rate period specific billing.

20. Regarding the issue of network efficiency, U.S. Tel argues that AT&T selected those trial areas likely to exhibit heavy toll usage and therefore the impact on the network is predictable. U.S. Tel believes this fact undermines the need for the experiment in order to test the impact of demand. SBS notes that because the experiment was designed to encourage usage it may adversely affect network efficiency.

21. ALTEL, a trade association of resale carriers, petitions for partial rejection of AT&T's tariff. It objects to a particular provision

of the tariff as anticompetitive and as unlawfully discriminating against resellers.[8] ALTEL argues that under this multi-line charging provision, resellers stand to be the only customer category affected.

22. Finally, SBS states that AT&T should be required to disclose the results of the rate experiment, if permitted to conduct it.

23. In its reply, AT&T disputes the petitioners' contention that the rate experiment must be supported by cost data. It states that this approach would unreasonably restrict the ability of any carrier to engage in rate experimentation because experiments are not susceptible to projecting detailed cost data. AT&T reiterates its view that the very purpose of conducting experiments is to evaluate the effect of service offerings on network efficiency, costs and earnings. AT&T states that although the Commission adopted a carrier specific approach and classified it as dominant in the *Competitive Carrier Rulemaking*, it later expressed concern with this policy.[9] In any event, AT&T argues that the instant tariff proceeding presents very narrow issues and is not the proper forum for resolving broad policy matters.

24. AT&T repeats its view that the experiment is soundly designed for the intended purposes and that customers would benefit from the optional rate plans. It states that the supplemental documentation it provided is adequate to determine that the experiment is valid, that the results will be reliable and that its purposes are worthwhile. AT&T states that it would not be cost effective to include rate period specific billing in this experiment and it will be able to adjust for any impacts.

25. AT&T argues that the optional rate plans are not offered below cost and that it expects interstate revenues generated by the experiment to exceed costs. Even though certain rates may be lower than competitors' rates, AT&T believes this should be encouraged by the Commission, not precluded. Addressing the concerns expressed by ALTEL, it states that it has no wish to exclude any particular class of users, but on the other hand has no obligation to maximize the benefits to resellers. AT&T said it included the billing provision ALTEL objects to in its tariff because this practice is consistent with current procedures used by Northwest Bell, and therefore it would promote administrative convenience and avoid customer confusion.

26. AT&T emphatically rejects SBS's contention that it should

---

[8] ALTEL objects to paragraph 3.1(c)(11)(a)(3). This provision states that: "Customers with more than one local exchange line in a rotary group (multi-line customers) in Iowa who participate in any of these calling plans will be charged a Subscription Charge for each line in the group and the associated usage will be billed on a per line basis. Multi-line customers in California and New York who participate in any of these calling plans will be charged one Subscription Charge for the group and the associated usage will be billed as if accumulated on one line."

[9] *See* note 7, *supra*, First Report and Order, 85 F.C.C. 2d at 10–11, and Further Notice of Proposed Rulemaking, 84 F.C.C. 2d at 456.

be required to disclose the results of the experiment. AT&T argues that SBS offered no authority for requiring disclosure to a competitor of what AT&T views as confidential business information. AT&T contends that no such authority exists.

## III. *DISCUSSION*

27. After evaluating AT&T's support for the proposed experiment, we are left with reservations about the procedures selected and the overall value of the project. AT&T's reply to the Bureau's question regarding the need for the study and the usefulness of the results relies heavily upon the experiment's complementary role in a larger rate experimentation and survey program. The same is essentially true of its answers regarding the desirability of using a non-scientific sampling technique, the soundness of the sample selection criteria employed, and the lack of consistency in the controllable conditions under which the study is to be conducted. However, while AT&T has advised us of a number of related study activities including field trials in several states and a nationwide written questionnaire survey, it has not provided any concrete information about the nature of its research objectives, the details and results of the work it has performed to date, or the relationship of the proposed rate experimentation to that ongoing work. Therefore, without substantially more information and analysis, we are not in a position to confirm AT&T's assessment that this is a necessary and useful experiment. Ordinarily, we would require more from the carrier before allowing such a project to go forward. However, we recognize that this is a first try at this kind of experiment, and AT&T may not have been certain about what would be necessary to pass regulatory muster. Taking this into account, we think that in this instance the experiment could be allowed to proceed if we attached certain conditions to safeguard against possible adverse consequences to the public. This approach would also conserve time and resources of all concerned. We discuss below our concerns with the experiment as proposed, and why our decision to limit it in both duration and scope should amply protect the public against any untoward effects. For these reasons, we are denying the petitions to reject or suspend AT&T's experimental tariff. In addition, we shall outline certain standards by which we intend to judge proposed experiments in the future. These should serve as a guide to AT&T so that it can avoid the practices which have led to the imposition of some of the controls in this case. Finally we wish to make clear that our action in allowing this limited experiment cannot be viewed as favorable precedent for our acceptance of similarly designed future experiments. Should AT&T wish to conduct other experiments, it will be required to describe in a clear and concise way the experiment's objectives, the method of approach, alternatives considered and reasons for the selection made,

and the results of and methodology used in any other research studies related to the proposed experiment. These standards are discussed more fully in paragraph 34, *infra*. More careful preparation in these areas will put the Commission in a position to allow any future experimental proposals to be swiftly implemented.

28. A fundamental concern about the present experiment involves AT&T's sample selection methodology. AT&T states that it composed its sample of trial areas by selecting exchanges characterized by heavy toll usage during the evening, night and weekend rate periods, that exhibited comparable demographics, and were not operating at or near network capacity.[10] It would appear, therefore, that the points finally selected were determined through a judgmental process relying on the stated criteria as guidelines.[11] One result of using a non-scientific sampling technique of this type is that major sectors of the study universe may not be represented in the sample. We note, for example, that the sample contains no rural exchange areas.[12] As the rural central offices or exchanges constitute a significant proportion of all exchanges, a more scientifically selected sample might well be expected to include rural areas. Regardless of the relative importance of having these areas to achieving reliable results in this particular experiment, the general public may perceive the experiment as a precursor to a discretionary form of rate deaveraging outside the purview of regulatory scrutiny. Such experiments may create anxiety among ratepayers, warranted or not, that particular sectors of the population will by intent not benefit from any permanent discounted rate plans. Indeed, we have received a letter commenting on AT&T's proposed experiment from V. Louise McCarren, Chairman of the Public Service Board of the State of Vermont. She states that she views the rate experiment as the beginning of disaggregated, deaveraged interexchange rates, and that this rate experiment and others like it would permit AT&T to reduce rates in markets where there is competition but not in

[10] AT&T's decision not to select offices at or near service capacity brings into question the feasibility of implementing the experimental plans on a nationwide basis. If AT&T sought later to introduce these rate plans on a nationwide basis, we would question the efficacy of a measure which stimulated busy hour traffic in areas where the plant is operating at or near capacity. Moreover, AT&T fails to explain what action it would take to minimize network impact in such cases.

[11] In this regard we note that Bell Canada recently filed a tariff with the Canadian government that seeks to implement similar long distance experimental rate plans to test their viability as regular service offerings. Unlike AT&T's experiment, Bell Canada plans to use a randomly selected sample of customers to conduct its test. See Tariff Notice No. 958 filed May 17, 1983, with the Canadian Radio-Television and Telecommunications Commission.

[12] The New York trial areas are East 79th Street and East 97th Street in New York City, and Central Islip and Deer Park in Long Island. In California the trial areas are Hollywood, Webster, and El Monte in Los Angeles; and Costa Mesa in Orange/Newport Beach, and Modesto. In Iowa the trial areas are east and west Des Moines, downtown Cedar Rapids, and downtown Sioux City.

markets where there is no competition, such as Vermont. This could result, says Chairman McCarren, in larger overall telephone bills for both interexchange access and interexchange toll in Vermont, and possibly the loss of interexchange service altogether. In order to minimize concerns such as these expressed by Chairman McCarren, we will require AT&T to provide us with a report which we will make public, describing the major findings and conclusions of the study by March 31, 1984. Furthermore, should AT&T propose to expand the optional calling plans to other geographic markets we would require it to file Section 61.38 economic support material. We would also consider requiring it to disclose the results of this or any other study so that we could determine their worth and validity. At such time we would address the full public policy implications of these MTS rate structures.

29. Another reason we must place conditions on the experiment is AT&T's subjective approach to sample design does not readily lend itself to regulatory review. Since the experiment has important rate level and marketing strategy implications, we must either be able to determine the reasonableness of any impact it may have on individual users or other carriers, or so limit the experiment in order to ensure that its effects on the public will not be significant. For example, if this sampling methodology were allowed to continue indefinitely or to be expanded, and it occurred that AT&T introduced a substantial MTS rate discount in a particular study area just prior to or coincident with the entry of a new competitor, the entrant could well be harmed.[13] In such an event we believe the Commission would not be in a position to readily determine whether these effects were a necessary consequence of the experimental design, or whether AT&T alternatively could have chosen another site to minimize the impact on competition.[14] We would like to avoid devoting our resources to investigations into the subjective factors and decisions which enter into any experiment design process. When such sensitive public interest concerns are at issue, therefore, we believe that we should discourage the proliferation of tariff practices

[13] It is even possible that competitors' entry decision could be affected by AT&T's advertising of the availability of new discounted rate plans in certain areas.

[14] If, for example, a random selection technique were used, the sample would normally be expected to include at least some of many exchange areas which are subject to intense competition. This would simply be a reflection of statistical probabilities. Where the sample is hand-picked, however, it would be difficult for us to determine whether the judgmental factors which entered into the sample selection did not intentionally target certain competitive areas or avoid others. This is not to say, of course, that use of a scientific sampling technique by itself would satisfy all of our concerns. Clearly, whatever techniques are used must be properly controlled to insure a proper balance between research ojectives and avoidance of public harm.

which rely heavily upon subjective criteria for justification when alternatives practices that lend to objective validation are available.

30. Apart from public impact concerns, certain features of the study design cause us to question whether AT&T will actually obtain usable results, even in the context of its overall research program. We shall discuss several of these features to place AT&T on notice as to the types of practices we believe should be avoided in the event it wishes to conduct other experiments in the future. For example, the sample used here is comprised principally of high volume users even though it would appear that small volume users would be as likely, or perhaps more likely, to be attracted by certain aspects of the rate plans such as postalized (non-distance sensitive) rates or the absence of rate period specific billing. These pricing factors clearly could result in savings to any customer, even one making only one or two calls per month. Furthermore, telephone calling patterns vary by community of interest and therefore the propensity to make additional phone calls may well differ greatly from area to area. Thus, usage habits of residential customers in the New York metropolitan area participating in the study would not necessarily be representative of the usage habits of residential customers located in more sparsely populated areas, even if income levels were similar. Moreover, it does not appear that a hand-picked sample would even provide reliable results to project responses of similarly situated customers in metropolitan areas with different demographic characteristics.

31. We also question the absence of RPSB procedures in the Tapered and Block-of-Time Plans and the effect of this factor on the reliability of the study results.[15] If RPSB procedures are not used, the entire call is billed at the rate in effect when the call was initiated. Obviously, the charges for the same call would differ substantially depending upon which billing procedure is used. AT&T does not state, however, that use of the different billing technique is one of the rate parameters it wishes to test during the experiment. Rather, it states that it would identify and adjust for the impact of this billing anomaly in the test results. We note that the trial areas chosen include New York and California locations which may lend themselves to extensive computer-to-computer application. Such traffic could take advantage of this billing discrepancy because it is easy to begin a very long data transmission call using automatic terminals at the end of the deepest discount period and allow it to

[15] The five rate options comprising the Linear Plan incorporate rate period specific billing for the base charge. Discounts would be applied to the total charge even if the call traverses two rate periods. In addition to the concerns we discuss about the possible distortion of results caused by the lack of rate period specific billing in the Tapered and Block-of-Time Plans, we think that the failure to consistently use this procedure throughout the experiment would unduly complicate the results to the point where the effects of these variables could not be separated from those of other variables.

extend into or traverse the entire full rate period. Finally, it is not clear that the individual customer tracking system AT&T intends to employ throughout the experiment will be able to offset the potential distortion caused by the lack of rate period specific billing.[16]

32. Notwithstanding the importance of the concerns we have raised here, we believe we can permit AT&T to conduct the experiment, as designed, while protecting against possible harmful effects by attaching the following conditions to our Section 61.38 waiver. First, AT&T may not extend the experiment beyond the specified expiration date of December 31, 1983. We believe it unlikely that any untoward market impact could occur in this short time frame, and a termination date will prevent the experiment from running on and developing the appearance of a permanent offering. Second, AT&T may not add central office code areas to those currently specified as trial areas in the tariff or augment or vary the rate plans being tested in each trial area. Third, in any related advertising or direct customer notification concerning the rate plans, AT&T must specifically and clearly state that the experiment is being conducted under special FCC tariff permission subject to the conditions that it will not extend beyond December 31, 1983 and will not expand to include additional exchange areas. These conditions are meant to respond to concerns, such as those expressed by Chairman McCarren of the State of Vermont, that AT&T will use the experiment to selectively deaverage MTS rates, accord any group of customers unreasonable preferential treatment, or engage in unfair competition.

33. As so conditioned, we are satisfied that AT&T will be able to conduct the experiment expeditiously and without significant impact on the market and the public interest. For this reason we are denying the petitions to reject or suspend AT&T's tariff implementing the rate experiment. We have tailored our conditions so as not to affect the basic purposes of the study. Thus, AT&T should be able to obtain the type of actual purchase behavior results that it claims will complement the other studies it has conducted and will be valuable in assessing its overall market research program for the possible development of modified nationwide MTS rate schedules.

34. As a final matter, before granting waivers of our tariff filing

[16] There are other inconsistencies in the conditions under which the experiment is conducted in the three study areas. For example, in Iowa, calling volumes will be collected on a line by line basis whereas in New York and California, group average billing is employed for multi-line customers with lines arranged in rotary groups, where usage on essentially all of a customer's lines is added together. This variation can have a very significant impact on the discount the customers receive in the different areas for the same volume of usage under the same rate plan. Dissimilarities in study conditions of the types described here could make it very difficult to accurately measure customer reaction to the different rate plans. In other words, the failure to stabilize background study conditions can mask the meaning of the final results as they relate to the desired study parameters.

rules in connection with any future proposals to implement rate experiments, we will require AT&T to meet the following standards. First, it must specify a termination date in the tariff, and explain why it has selected this date. It must describe in detail the objectives of the study and how these objectives will specifically benefit the public. It must also include in the tariff filing a full explanation of the study methodology, why it selected this approach over alternative approaches, how the sample size was determined, and the basis for determining the degree of statistical reliability the experiment is anticipated to achieve. We urge AT&T to select experimental samples on as scientific a basis as possible, and try to avoid subjective or judgmental approachs of the type it has employed here. If AT&T should choose, however, to use a subjective sampling technique it should satisfactorily explain in its tariff filing why a scientific approach is not workable. In addition, the sample size should be as limited as possible to achieve clearly stated objectives. AT&T should provide concrete justification for the sample size selected, and explain why a smaller sample could not be used. If AT&T is conducting or planning related research or other trials in the same geographic market area(s), it should describe these studies and include an analysis of the results from available data. We will also expect AT&T to estimate the total cost of conducting the experiment and specify how such costs will be recovered. Finally, AT&T should describe the manner in which it intends to advertise or notify customers of the experiment, and append illustrative examples of advertisements or notices.

35. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate the above-captioned tariff revisions ARE DENIED.

36. IT IS FURTHER ORDERED, that this Memorandum Opinion and Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

SEPARATE STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: American Telephone and Telegraph Company, Revisions to Tariff FCC No. 263 Message Telecommunications Service (MTS), Transmittal No. 14251.

I share Chairman McCarren's view that our approval of this action could be perceived as the "camel's nose under the tent" as far as rate deaveraging is concerned.[1] I write to emphasize that today's action is not, and should not be construed as, *de facto* selective rate

[1] Memorandum Opinion and Order (MO&O), para. 28.

deaveraging; nor is it an opportunity for AT&T to establish a "record" under a deaveraging experience; nor should it be construed as any precedent for future rate deaveraging.[2] This action is undertaken solely to afford AT&T the opportunity to examine customer demand and the impact of the MTS calling options on network utilization, efficiency, and cost and revenues before implementing the plans *nationwide*.[3] I am satisfied that the conditions imposed upon this experimental tariff proposal are appropriate to protect competitors and the public from any significant adverse impact.

---

[2] This Commission would not embark on such a significant course until it had conducted a full and careful examination of the fundamental policy implications; deaveraging would not be "implemented" on an *ad hoc* basis.

[3] This is the stated purpose of AT&T's experiment. MO&O, para. 3.

Common Carrier, Rate Structure, Inquiry
Tariff, Investigation

Part time/full time rate structure based on 60/40 percent division of present and future revenue requirements-adopted as reasonable for AT&T's Series 7000 Terrestrial Television Transmission Services. Further action investigating unjust discrimination deferred until further notice.
AT&T CO.
CC Docket No. 81–351

FCC 83–289

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In the Matter of<br>AMERICAN TELEPHONE AND TELEGRAPH COMPANY<br>Revisions to Tariff F.C.C. Nos. 258 and 260, and the Establishment of Tariff F.C.C. No. 269, for Series 7000 Terrestrial Television Transmission Services | CC Docket No. 81–351 |

MEMORANDUM OPINION AND ORDER

(Adopted June 23, 1983; Released June 28, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. We consider at this time the most recent development in our investigation of the tariff provisions governing American Telephone and Telegraph Company's (AT&T) tariff for terrestrial television transmission services. Presently before us are an Interim Settlement Proposal submitted on December 1, 1982, by the User Parties[1], AT&T's comments on the proposal, and the User Parties' response.[2] As explained below, we believe that the rate structure proposed by the User Parties would be reasonable for use in a future AT&T filing proposing revisions to its Series 7000 service offerings and may

[1] The User Parties are: The American Broadcasting Companies, Inc.; CBS, Inc.; National Broadcasting Company, Inc.; Hughes Television Network; the Commissioner of Baseball; the Association of Independent Television Stations, Inc., and Cable News Network, Inc.

[2] Also before us are the comments of: Entertainment and Sports Programming Network, Inc.; Storer Communications, Inc.; the National Basketball Association and the National Hockey League; and the National Association of Broadcasters.

provide an adequate basis for terminating this investigation. To the extent that the User Parties and AT&T continue to differ on issues of rate levels, changes in late order charges, and related matters, we believe that our ordinary tariff review processes will provide an adequate opportunity to decide each on its own merits.

*Background*

2. Since its inception in the late 1940's, AT&T's terrestrial television transmission service (Series 7000) has been offered on a full time and part time or occasional basis.[3] The three major television networks are virtually the only users of full time service, while part time service, which is offered at a substantially higher per hour rate, is used by occasional distributors of sports, news, and entertainment programming, as well as by the networks. For this reason, the Commission has been concerned over the years that AT&T's Series 7000 rate structure might unreasonably discriminate against part time or occasional users.

3. Our concern in this regard has led the Commission to undertake several investigations of the Series 7000 rate structure focused primarily on the discrimination issue. Over a decade ago, for example, the Review Board upheld a Hearing Examiner's finding, after a formal hearing, that full time and occasional use were "like" service under Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), and that the Series 7000 rate structure in effect at that time resulted in unreasonable discrimination against occasional users.[4] During the pendency of that proceeding, AT&T filed new rate schedules, which among other things, reduced the rate for occasional use and set up a sliding scale which allowed monthly contract customers to purchase service in amounts of one to 24 hours per day. Because the Commission believed that the new rates and rate structure might at least ameliorate the unlawful discrimination in the existing tariffs, it allowed the revisions to become effective while setting them for investigation in Docket No. 18684.[5]

4. Then in 1972, AT&T submitted new tariffs which proposed increases in the part time use rates and the adoption of a single full time, 24 hour per day service. AT&T claimed these revisions were necessary to prevent its largest contract users, namely the networks, from shifting to specialized microwave carriers. This tariff filing was suspended and its investigation was consolidated into the ongoing

[3] There are three principal Series 7000 service elements: interexchange channels (IXC's), station connections (SC's), and local channels. IXC's connect AT&T Television Operating Centers (TOC's) located in cities around the United States. SC's connect the IXC's to local channels, which in turn connect the TOC's to the studio or other point of origination.

[4] Hughes Sports Network, Inc. v. AT&T, 25 FCC 2d 550 (Rev. Bd. 1970), *review granted in part*, 34 FCC 2d 691 (1972).

[5] Docket No. 18684, FCC 69–1038, released October 9, 1969.

Docket No. 18684 proceeding. However, the investigation was terminated without a decision on the merits when we accepted a stipulation of the parties to a revised tariff.[6] Under the terms of this stipulation, which was effective until December 31, 1975, AT&T retained the suspended rates, except that the increase for occasional use channels was reduced.

5. In 1977, after the 1973 stipulation had expired, AT&T filed revisions to the Series 7000 offering which would have increased part time rates substantially, while proposing much smaller rate increases or rate reductions to full time services. In rejecting these revisions, the Commission reaffirmed that full time and part time services are "like" within the meaning of Section 202(a) and concluded that AT&T had failed even to attempt a cost justification for its proposed rate structure.[7]

6. The present investigation was instituted in May 1981 after AT&T filed new tariff revisions which purportedly brought part time and full time Series 7000 services into a unified rate schedule. However, it appeared to us that under these revisions, the rate disparties between full time and part time users would continue and were not justified. Thus, we suspended these revisions and set for investigation various rate structure issues.[8] After compiling a record of written pleadings, we found the revisions unjustified or unreasonable, and therefore unlawful.[9] Accordingly, aside from across the board increases to all private line rates in 1980 and 1981, the rates and rate structure agreed to in the 1973 stipulation have remained in effect to the present. In order to finally resolve the long-standing discrimination issue, we commenced a second phase of the latest investigation for the purpose of prescribing a reasonable series 7000 rate structure. We requested comments on our proposed prescription of an interim rate structure, which could be observed in operation and form the basis for a more permanent prescription. Issues of the proper rate level were generally deferred until the question of a nondiscriminatory rate structure was resolved.[10]

7. On December 1, 1982, the User Parties submitted the Interim Settlement Proposal now before us. Under the proposal, the existing

---

[6] AT&T, Docket No. 18684, 44 FCC 2d 525, 527 (1973).

[7] AT&T, 67 FCC 2d 1134 (1978), *recon. denied.*, 70 FCC 2d 2031 (1979), *aff'd sub nom.* ABC v. FCC, 663 F.2d 133 (D.C. Cir. 1980).

[8] AT&T, Docket No. 81–351, 86 FCC 2d 861 (1981). Specifically, we were concerned that the rate structure under those revisions was not sufficiently sensitive to actual usage; that the sloping rate for IXC and SC services and the special facilities construction charges for full time service would each result in higher rates for part time users; and that the form of rate averaging proposed by AT&T might result in fragmentation of the Series 7000 market according to different service attributes, such as length of service, that bear little relation to actual costs incurred.

[9] AT&T, CC Docket No. 81–351, 88 FCC 2d 1656 (1982).

[10] *Id.*

part time/full time rate structure would be basically retained. The only change would be a reduction in part time IXC rates and an increase in full time IXC rates so that 60 percent of the IXC revenue requirement would be recovered by full time IXC rates and 40 percent by part time rates.[11] Future increases in revenue requirements would also be distributed on a 60–40 basis between full time and part time IXC services. The proposed settlement also requests that pending AT&T proposals advanced earlier in this proceeding for increased late order and cancellation charges be withdrawn, that customers be allowed the option of providing their own local channels, and that the agreement remain in effect for 18 months during which time the rates would be frozen.

8. In commenting on the proposed settlement, AT&T largely agrees that the proposed rate structure could be reasonable and workable for Series 7000 service. It approves using the existing rate structure as modified by the 60/40 percent proposal, and also agrees that use of this proposal could be reasonable to allocate future increases in the revenue requirement. However, AT&T claims that the specific rates proposed by the User Parties would not generate revenues equal to existing revenues for terrestrial television transmission service and should not form the basis for any settlement. In fact, according to AT&T, rates for all Series 7000 service elements would have to be increased even further to achieve a return for this service equal to the 12.75 percent rate of return authorized for the company as a whole. It also opposes the User Parties' request that the increased late order and cancellation charges be withdrawn, claiming that customer ordering practices frequently result in a loss of revenue. Thus, AT&T asserts that modifications to the proposed settlement are necessary to enable it to recover its revenue requirement for this service. Finally, AT&T does not agree to allow interconnection of customer-provided local channels and the freezing of rates for 18 months. In response, the User Parties request that we convene a "working session" to be attended by all interested parties for the purpose of resolving the remaining differences between AT&T and the User Parties.

*Discussion*

9. As noted above, the purpose of this investigation has been to determine whether the disparity between part time and full time rates for terrestrial television transmission service unreasonably discriminates against part time users and, if necessary, to prescribe a rate structure for the Series 7000 offering.[12] However, the parties to

[11] The User Parties calculate that this would result in an approximate 9 percent increase in the full time IXC rate and an approximate 25 percent decrease in the part time rate.

[12] The only issue in this investigation concerning the rate level was whether certain

the Interim Settlement Proposal, including the major part time and full time users of Series 7000 service, apparently agree that a modified version of the existing rate structure is basically acceptable to them all. Although each might prefer a rate structure more favorable to its particular interests, these parties all accept a full time/part time structure based on a 60/40 allocation of costs as reasonable and nondiscriminatory. AT&T also believes the proposed rate structure is acceptable. While a mutual understanding has thus apparently been reached on the core issue of this long-standing controversy, the parties disagree upon other issues which may or may not bear upon this basic understanding and which were not among the issues specifically designated for investigation.

10. It appears to us that the agreement has brought us close to a conclusion of this matter. We agree with the parties that the full time/part time rate structure based on a 60/40 cost allocation could be reasonable for the foreseeable future. A structure upon which the various classes of customers agree is not likely to be unreasonably discriminatory. We also believe that the rate structure issue is severable from the other remaining issues because it resolves this discrimination issue by allocating costs. The other issues largely concern the overall rate level, termination liabilities, and points of interconnection, issues not of allocation and discrimination among customers but of whether the carrier is proposing reasonable terms for all customers. Under these circumstances, it appears to us that the fairest and most expeditious way to resolve these remaining issues is the normal tariff review process. The issues on which AT&T and the User Parties disagree are, for one thing, outside the scope of those originally set for investigation and have not been fully presented for public scrutiny or considered in context. The normal tariff review process is also limited in time, while negotiations might continue indefinitely or fail. We see no persuasive reason to substitute negotiations on these other points for the statutory process set out in the Communications Act and our Rules. If AT&T wishes to propose the rate increases and other tariff changes it claims are necessary, it will be required to submit the usual justification, and the User Parties will then have an opportunity to address the reasonableness of these proposals.

11. We are assuming that the 60/40 allocation and rate structure as filed will be generally acceptable to users, though they may disagree with AT&T on other issues. If, however, the User Parties are unwilling to accept this allocation absent a favorable resolution of the other issues, and believe it in fact to be unreasonable when

---

investment in lines should be allowed as part of the rate base. *See* 86 FCC 2d 861 at 872–73. We have already decided that issue, *see* 88 FCC 2d 1656 at 1676–77, and it is not contested here. We also considered and resolved certain cost issues raised by the networks, although those issues were not specifically raised in the designation order.

taken alone, we will consider their comments on AT&T's next tariff filing, assuming it incorporates the 60/40 split, and decide at that time whether to allow it to become effective, and if rate structure questions persist, whether to move forward with Commission prescription of a Series 7000 rate structure. We defer further proceedings in this docket until the tariff review process is completed or until AT&T informs us that it is unwilling to use the 60/40 rate structure. We will issue a further order at that time.

12. In view of the foregoing, IT IS ORDERED, That the filing date for reply comments in this investigation IS DEFERRED until further notice.

13. IT IS FURTHER ORDERED, That the Secretary shall cause this order to be published in the FEDERAL REGISTER.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Application, Amendment of, After Designation, Rejected
Comparative Hearing
Estoppel
FM Station, Authorization
Review by Review Board
Transmission First Local

Review Board affirms Initial Decision and grants FM construction permit to applicant proposing a first local transmission service, pursuant to Sec. 307(b) of Communications Act. Board rejected losing applicant's post-hearing amendment, which sought to change proposed community of license to preferred community, for lack of good cause; doctrine of judicial estoppel applies.

*–Beaufort County B/cing Co.*

BC Docket No. 80–775

FCC 83R–51

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| Carmen D. Trevitt and Calvin R. Means d/b/a BEAUFORT COUNTY BROADCASTING COMPANY Beaufort, South Carolina | BC Docket No. 80–775 File No. BPH-790918AC |
| BARNACLE BROADCASTING LTD. Port Royal, South Carolina | BC Docket No. 80–776 File No. BPH-800519AF |
| For a Construction Permit for a New FM Station | |

*Appearances*

*Lawrence J. Bernard, Jr.* for Beaufort County Broadcasting Company; and *Frank J. Martin, Jr.* and *David A. Gross* for Barnacle Broadcasting Ltd.

DECISION

(Adopted: July 15, 1983; Released: July 22, 1983.)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. After a trial-type comparative hearing, Administrative Law Judge Frysiak in a comprehensive 40 page Initial Decision, FCC 82D-77, released December 10, 1982, concluded that Section 307(b) of the Communications Act as interpreted by Court and Commission precedent required the grant of the application of a new FM radio station for the community of Port Royal, which does not have its own local station. The other community involved, Beaufort, South Carolina, has three other local stations. *See I.D.*, paras. 158–161. Briefs and exceptions were filed January 31, 1983; replies on February 15 and 16; and oral argument was held March 25. Subsequently, on May 13, 1983, the Beaufort applicant filed an amendment proposing to change its station location to the 307(b) preferred community of Port Royal. In essence, the Board has concluded that the Beaufort applicant has not shown good cause for its unprecedented and very belated request to change the location of its proposed station, and that the ALJ correctly found that Section 307(b) required a grant to Port Royal which does not have its own local station. *See, e.g., Pasadena Broadcasting Co.* v. *FCC*, 555 F.2d 1046, 1050 (D.C. Cir. 1977); and *Harrell* v. *FCC*, 267 F.2d 629, 18 RR 2072 (D.C. Cir. 1959).

2. *Background*: The two communities in this case, Beaufort, population 8,634, and Port Royal, 2,977, are both located in Beaufort County, population 65,364. Both the county and communities are located on a triangular peninsula some 50 miles southwest of Charleston, but are not part of an urbanized area. When the two applications were filed in 1979 and 1980, a Class A low power FM channel was assigned to Beaufort. By virtue of the Commission's rules then in effect the FM channel could also be applied for in Port Royal. See former Section 73.203(b). In accordance with Commission practice at that time a hearing was ordered to determine which community had a greater need for a station. *See, e.g., Casey Broadcasting Co.*, 89 FCC 2d 618, n. 2 (Rev. Bd. 1982). *See also Campbell & Sheftall*, 7 FCC 2d 658, 9 RR 2d 999 (Rev. Bd. 1967).

3. After the filing of the applications, the Commission in a separate rulemaking proceeding, deleted the Class A FM channel from Beaufort and substituted in its place a Class C higher power station which would cover a larger area. *Beaufort-Ridgeland, S.C.*, 48 RR 2d 1559 (Br. Bureau 1981). Both applicants were permitted to amend their application to substitute the new chnnel for the deleted channel. They did so, but, as was the Commission's practice at that time, the rulemaking proceeding did not resolve which of the two communities had a greater need for a station. While both applicants were aware of the rulemaking and filed limited comments, neither

sought to foreclose the other from utilizing the channel in the other's community.[1]

4. At the hearing, the competing Beaufort applicant twice attempted to demonstrate that the Port Royal applicant was motivated by a desire to serve Beaufort. On both occasions, the ALJ denied the "Berwick doctrine" issue because the threshold showing had not been made. A major point in the Beaufort brief is that the ALJ erred in refusing to add that issue "despite uncontradicted evidence that [the] sole reason for filing a Port Royal application was to gain a 307(b) advantage" Br. 21–30. However, at oral argument the Beaufort applicant acknowledged that this point had become moot because of a recent Commission policy decision which retroactively deleted the Berwick issue from all hearings. *See Suburban Community Policy, Berwick Doctrine, Etc.*, 53 RR 2d 681 (1983); Tr. 1171.

5. From the beginning of the hearing through the oral argument before the Review Board the Beaufort applicant continued to press its major point that Section 307(b) does not require the grant of a higher power Class C FM station to the small town of Port Royal (Br. 4–21). Then in an ironic *volteface* following oral argument the Beaufort applicant filed an amendment proposing to switch its station location from Beaufort to Port Royal. Recognizing the belated nature of its amendment it argued that good cause exists here because the Commission's retroactive abolition of the "Berwick doctrine" had a substantial impact on its application by depriving it of the opportunity to challenge the *bona fides* of the competing application for Port Royal. Petition pp. 3 and 5. The Port Royal applicant opposed the amendment noting that twice the ALJ had ruled as a matter of fact that the Beaufort applicant had not justified the addition of a *Berwick* issue; that the Beaufort applicant had vigorously prosecuted its application for Beaufort on a different legal theory, and only after an unfavorable Initial Decision on the Section 307(b) issue, did it propose the amendment "gambit to avoid a final adverse determination of the 307(b) comparative issue." Reliance was also placed on estoppel or preclusion because of Beaufort's inconsistent position or opportunistic reversal of theory during litigation. *See* 1B Moore, *Federal Practice*, at 765 et seq. (2d Ed. 1971); and *Allen v. Zurich Insurance Co.*, 667 F.2d 1162, 1166–68 (4th Cir. 1982). Opposition, pp. 5–7, 16–17.

6. *Discussion*: A change in station location in the FCC licensing process is considered a "major amendment" which requires that the application be returned to the end of the processing line, thereby

[1] Recently, the Commission amended Section 73.203(b) so that, in the future, applications for communities not listed in the Commission table of FM assignments, such as that of Port Royal, will be considered in a rulemaking proceeding to change the table of assignments. *See Suburban Community Policy, Berwick Doctrine, Etc.*, 53 RR 2d 681, 693–694 (1983).

losing its place and its right to be compared with previously filed applications. *See* Section 73.3573(a)(1). No case has been cited in which an applicant was permitted to change its station location after the issuance of an unfavorable Initial Decision, and we are aware of none. Thus, an applicant who proposes such an unprecedented action must make a persuasive showing. *See Casey Broadcasting Co., supra,* 89 FCC 2d 618. This is especially true in a comparative case where a competing applicant would be prejudiced by such action. *See Commercial Radio Institute, Inc.,* 78 FCC 2d 1016 (Rev. Bd. 1980).

7. Here the Beaufort applicant has not shown good cause for its amendment. As the competing applicant points out, the Commission's abolition of the *Berwick* doctrine did not have a substantial impact on the Beaufort applicant because, prior to that time, it had twice failed to make the factual showing requiring a trial of that issue. Moreover, Beaufort's proposed amendment is inconsistent with its major argument, both at the hearing and oral argument, that the small town of Port Royal should not receive a 307(b) advantage because this case involved a Class C high power station. When the ALJ did not accept this theory it countered with an inconsistent and opportunistic switch in station location. The Commission need not play such "games with applicants." *See Fischer* v. *FCC,* 417 F.2d 551, 555 (D.C. Cir. 1969). Thus, Beaufort's amendment will be rejected.

8. Section 307(b) requires the Commission to make a fair, efficient and equitable distribution of radio facilities. *See generally Casey Broadcasting Co., supra.* In past actions the Commission has tried to insure that as many communities as possible receive at least one radio station. This objective flows from the local nature of radio and Section 307(b) of the Communications Act. In *FCC* v. *Allentown Broadcasting Co.,* 349 US 358 (1955), the Supreme Court agreed that if a Section 307(b) choice could be made between conflicting applications for different communities (here Beaufort and Port Royal) the Commission could grant the application proposing to serve the community with the greater need, without first determining which applicant is comparatively better qualified to provide radio service. The principle that each community has a need for its own radio station to act as a local outlet for self expression has hardened into a "presumption." Thus, several decisions which appeared to ignore this legal principle were reversed by the Court of Appeals which insisted on a strong evidentiary showing before a community's need for its first local outlet could be overcome. See *Harrell* v. *FCC, supra,* 267 F.2d 629; and *Pasadena Broadcasting Co.* v. *FCC, supra.* And the Review Board has held that the Commission's present practice is that a choice will be made under Section 307(b) if the record reveals "sufficient differences between the proposals to permit a meaningful 307(b) choice". *WHW Enterprises, Inc.,* 89 FCC 2d 799, 812 (Rev. Bd. 1982), *rev. pending.*

9. At the hearing it was established that Port Royal, with a growing population of nearly 3,000 persons, has been in existence for more than four hundred years—since 1562—and is a separate community without its own radio station. See ALJ's detailed Findings, paras. 51–72. Beaufort has a population of nearly 9,000 but it already has three local radio stations. Thus, under well established policy, the ALJ concluded that Port Royal is entitled to its first local outlet. *Pasadena Broadcasting Co.* v. *FCC, supra*; *Harrell* v. *FCC, supra*; *FCC* v. *Allentown Broadcasting Co., supra*, 349 U.S. at 361–362.

10. As noted above, in its exceptions and oral argument the Beaufort applicant urged that a Section 307(b) choice should not be made in this case because a high power Class C FM station was being proposed for use in the small town of Port Royal; and neither applicant should receive a Section 307(b) preference since both applicants could be considered as providing regional service to large areas and populations. Considerable reliance was placed on the Commission's decision in *Massillon Broadcasting Co., Inc.*, 36 FCC 809, 2 RR 2d 409, 415–16 (1964), and our recent decision in *Cleveland Television Corp.*, 91 FCC 2d 1129 (Rev. Bd. 1982), *rev. denied*, FCC 83–235, released May 18, 1983.

11. These and similar cases involved applicants for suburban communities located near the dominant central cities, *e.g.*, Massillon and Cincinnati Shaker Heights and Cleveland. Here the ALJ's findings establish that both Beaufort and Port Royal are isolated from Charleston, and some 50 miles away. Port Royal is a very old and growing community, although it is smaller than Beaufort. On the record before him, *I.D.*, paras. 51–72, the ALJ correctly concluded that Port Royal needs its first local station more than Beaufort, with approximately three times the population, needs its fourth station. *See Service Broadcasting Corp.*, 36 FCC 1085 (Rev. Bd. 1964), where the Board held that Zion, Illinois with a population of 11,941 needed its first local outlet more than Kenosha, Wisconsin, population 67,899, needed its second competing local station. Here, as in *Service, supra*, 36 FCC at 1089, without substantial evidence we cannot presume that Port Royal's need for a first local transmission facility is being met by stations located in other communities. *See also Harrell* v. *FCC, supra.*

12. Nor can we accept Beaufort's arguments that the Class C FM station involved in this case should be treated like the television channel involved in *Cleveland Television Corp., supra.* Both the Commission and the courts have recognized that because of policy considerations applicants for television stations should be treated in a different manner.[2] Television channels are much more scarce than

[2] The Board has previously noted that "Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments,

FM and AM radio facilities and are expected to serve much broader areas whereas the many more radio stations can concentrate on localized service. See *e.g.*, authorities discussed in *Cleveland Television Corp., supra*, 91 FCC 2d at 1136–1137. See also *Stone* v. *FCC*, 466 F.2d 316, 327–328 (D.C. Cir. 1972). Beaufort has simply failed to rebut Port Royal's presumptive need for its own first local radio station, *Harrell* v. *FCC, supra*, and we therefore affirm the ALJ's conclusion that the application "for Port Royal is preferred under the Section 307(b) issue, and this case can be decided under such issue." *I.D.*, para. 161. *FCC* v. *Allentown Broadcasting Co., supra*. We have reviewed Beaufort's other objections and agree with the ALJ's dispositions of those points.

13. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend Application filed on May 13, 1983, by Beaufort County Broadcasting Company, IS DENIED; that the application filed by Beaufort County Broadcasting Company (File No. BPH-790918AC) IS DENIED; and that the application of Barnacle Broadcasting Ltd. (File No. BPH-800519AF) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

---

and require larger audiences to attract more advertising revenues." Moreover, "the number of television channels available is much more limited and, consequently, the television service area for Section 307(b) purposes 'should be defined in terms of coverage and not in terms of artificial political boundaries.'" Unlike AM or FM radio stations, television provides "an areawide, rather than a localized service." *Cleveland Television Corp.*, 91 FCC 2d at 1137. A recent Commission report shows that the Commission has licensed some 1,000 television stations and more than 9,000 radio stations.

FCC 82D–77

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of<br>Carmen D. Trevitt and Calvin R. Means d/b/a<br>BEAUFORT COUNTY BROADCASTING COMPANY<br>Beaufort, South Carolina | BC Docket No. 80–775<br>File No. BPH-790918AC |
| BARNACLE BROADCASTING LTD.<br>Port Royal, South Carolina | BC Docket No. 80–776<br>File No. BPH-800519AF |
| For a Construction Permit for a New FM Station | |

*Appearances*

*Lawrence J. Bernard, Jr.* on behalf of Beaufort County Broadcasting Company; *Frank J. Martin, Jr.* and *David Gross* on behalf of Barnacle Broadcasting Ltd.; and *Arthur I. Steinberg* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

(Issued: November 30, 1982; Released: December 10, 1982)

*Preliminary Statement*

1. This proceeding involves the mutually-exclusive applications of Carmen D. Trevitt and Calvin R. Means, d/b/a Beaufort County Broadcasting Company (BCBC) requesting authority to construct a new Class C commercial FM broadcast station on channel 259C at Beaufort, South Carolina, and Barnacle Broadcasting Ltd. (Barnacle) requesting authority to construct a new commercial FM broadcast station on channel 259C at Port Royal, South Carolina. Channel 259C is assigned to Beaufort, South Carolina in the Commission's Table of FM Channel Assignments, Section 73.202(b) of the Commission's Rules.[1] Barnacle's application was filed pursuant to Section

[1] As originally filed, these applications requested permission to construct a new station on FM channel 285A. However, in the *Hearing Designation Order*, 46 Fed. Reg. 7439, published January 23, 1981, the Commission indicated that there was then pending a proposal in BC Docket No. 80–214 to replace channel 285A with

73.203(b) of the Commission's Rules which makes channel 259C available for use at Port Royal because that community's boundaries are adjacent to Beaufort and thus within the 15-mile radius in which an assigned FM channel may be used.

2. By *Hearing Designation Order*, 46 Fed. Reg. 7439, published January 23, 1981, the aforementioned applications of BCBC and Barnacle were set for hearing. Subsequently, pursuant to various orders of the presiding judge,[2] issues were added to this proceeding and modified. Thus, the issues involved herein now read as follows:

1. To determine whether Carmen D. Trevitt and Calvin R. Means dba Beaufort County Broadcasting Company has failed to comply with Rule 1.65 by not reporting an adverse determination by the FAA as to its proposed tower and, if so, the effect of such noncompliance on the applicant's comparative qualifications.

2. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine whether Barnacle Broadcasting Ltd. has failed to comply with Section 1.65 or Section 73.3514 of the Rules by not reporting to the Commission that Mrs. Wilson conducted a part of the community leader survey, and if so, the effect of such noncompliance on the applicant's comparative qualifications.

5. To determine whether Beaufort County has made misrepresentations or abused Commission processes or been lacking in candor with respect to a document submitted to the Commission purporting to be the affidavit of Mrs. Catherine Vaughn dated February 10, 1981.

6. To determine whether Beaufort County has made misrepresentations or abused Commission processes or been lacking in candor with respect to the affidavits of Jack Queener dated February 11, 1981 and Charlotte L. Green dated February 10, 1981.

7. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. A prehearing conference was held on April 14, 1981, and a further conference was held on July 2, 1981. Hearing sessions were

---

either channel 261A or channel 259C, and stated that in the event either of the proposed channel changes was made, the applicants would be granted leave to amend their applications to specify operation on the new channel. Subsequently, in *Beaufort-Ridgeland, South Carolina*, 48 RR 2d 1559 (1981), the Commission amended Section 73.202(b) by substituting channel 259C for channel 285A, and each of the applicants amended their applications to specify operation on the new channel.

[2] *Memorandum Opinion and Order* FCC 81M-1164, released April 20, 1981; *Memorandum Opinion and Order* FCC 81M-1526, released May 14, 1981; and *Order* FCC 81M-2096, released July 9, 1981.

held in Washington, D.C. on November 9, 10, 12, 13 and 20, 1981. The record was closed on November 20, 1981. Proposed findings of fact and conclusions of law were filed on May 3, 1982 by the Broadcast Bureau and on May 7, 1982 by the applicants, and reply findings were filed by the applicants on June 2, 1982.

## *Findings of Fact*

### *The Applicants*

#### *Beaufort County Broadcasting Company*

4. BCBC is a general partnership formed under the laws of the state of South Carolina. The three partners of the company and their ownership interests are: Carmen D. Trevitt - 75%; Fred Washington, Sr. - 15%; and Calvin R. Means - 10%. BCBC Exh. 9, p. 1.

5. Two of the partners of BCBC have interests in other communications media. Mr. Trevitt is the president, a director and the owner of 80% of the stock of Cohutta Broadcasting Co., Inc., licensee of FM radio station WQMT, Chatsworth, Georgia. WQMT operates with 3 kW power from an antenna located 300 feet above average terrain and provides service to Murray County, Georgia and portions of Gilmer, Whitfield and Gordon Counties in Georgia, as well as a small portion of Polk County, Tennessee. WQMT does not provide service to any portion of the state of South Carolina. Chatsworth, Georgia is approximately 208 air miles northwest of Beaufort, South Carolina. BCBC Exh. 9, p. 1. Mr. Trevitt is also a partner and owner of a 90% interest in Chatsworth Cablevision Company, the operator of a CATV system serving Chatsworth and portions of surrounding Murray County, Georgia. The system has approximately 1,050 subscribers, but does not originate local programming. BCBC Exh. 9, p. 2.

6. Mr. Means owns the other 20% of the stock of Cohutta Broadcasting Co., Inc., is an officer and director of that company and serves as the general manager of WQMT. Mr. Means also is a partner with a 10% interest in Chatsworth Cablevision Company. Other than the above-described interests, neither Mr. Trevitt nor Mr. Means owns or has any connection with any media of communications. BCBC Exh. 9, p. 2. Mr. Washington does not have any interest in or association with any existing media of communications. BCBC Exh. 7, p. 2.

7. Mr. Trevitt, the owner of a 75% partnership interest in BCBC (BCBC Exh. 9, p. 1), will move his place of residence to the Beaufort area if BCBC's application is granted and will supervise construction of the station. When the station begins operations, Mr. Trevitt will become its full-time general manager, devoting at least 40 hours per week to the supervision of the day-to-day operation of all aspects of the station, including the coordination of sales efforts and the production of entertainment, news and public affairs programming.

He will serve as chief financial officer of the station and will hire all employees after consultation with Mr. Washington, who will supervise the implementation and administration of the station's Equal Employment Opportunity Program. BCBC Exh. 10, pp. 3–4; Tr. 477–80.

8. Mr. Trevitt was born in Dalton, Georgia on September 22, 1927. He attended the public schools of Dalton and was graduated from the Capitol Page School in Washington, D.C. while serving as a page in the U.S. House of Representatives. He attended Mercer University in Macon, Georgia, graduating in 1950 with an A.B. degree. He served in the U.S. Army in 1946 and 1947 and again in 1950 and 1951 during the Korean conflict. He married in 1951 and lived in Forsyth, Georgia from 1951 until 1979. He has five sons, ranging in age from 10 to 29 years. During the time he lived in Forsyth, Mr. Trevitt taught school and coached basketball on the high school level in the Forsyth County school system. He also owned and operated a dairy farm near Forsyth from 1952 until 1969 and engaged in other farming activities. While in the dairy business, he served on the Board of Directors and was treasurer of a dairy business in Atlanta, Georgia. He was also on the Board of Directors and was president of the Tri-County Artificial Breeders Association, was on the Board of Directors of the Monroe County Chapter of the Georgia Farm Bureau, and was on the Area Committee of the Farmers Home Administration. He was a charter member of the Monroe County Junior Chamber of Commerce, a member of the Forsyth Lions Club, a director and president of the Monroe County Chamber of Commerce, and president of the Mary Persons Touchdown Club. BCBC Exh. 10, pp. 1–2.

9. From 1960 until 1980, Mr. Trevitt was president and 100% owner of Village Outlet Stores, Inc., the operator of ladies sportswear outlet stores in Forsyth and several other Georgia cities, including Dalton, Smyrna, Gainesville and Commerce. BCBC Exh. 10, p. 2.

10. In 1973 Mr. Trevitt, through his wholly-owned company, Forsyth Broadcasting Company, received a permit from the Commission to construct a new Class A FM broadcast station in Forsyth. He supervised the construction of that station, WFNE-FM, and it began operating in November 1973 as the first broadcast station licensed to Forsyth. He was active in the day-to-day management and operation of WFNE until it was sold in November 1979. BCBC Exh. 10, p. 2; Tr. 497.

11. In 1975 Mr. Trevitt formed Cohutta Broadcasting Company, and now owns 80% of the stock of its successor, Cohutta Broadcasting Co., Inc. In 1975 Cohutta Broadcasting Company was granted a permit by the Commission to construct a new Class A FM broadcast station in Chatsworth, Georgia. In 1976 Mr. Trevitt and his partner, Mr. Means, built the station, WQMT-FM, and it began operations on November 13, 1976 as the first broadcast facility licensed to

Chatsworth. In 1978 Messrs. Trevitt and Means formed Chatsworth Cablevision Company which received a cable television franchise from the Chatsworth city government. BCBC Exh. 10, pp. 2–3.

12. After the sale of WFNE, Forsyth, Georgia, in 1979, Mr. Trevitt moved to the Chatsworth area and continues to reside there. He moved because his main business interests were then in the Chatsworth area and he wanted to be able to supervise their operation on a day-to-day basis. He presently supervises the operation of WQMT on a day-to-day basis in consultation with Mr. Means, who serves as the general manager of the station. Mr. Trevitt also supervises the day-to-day operation of the cable company. BCBC Exh. 10, p. 3; Tr. 484.

13. Messrs. Trevitt and Means have not yet decided precisely how Mr. Trevitt's duties at WQMT and the cable television system will be assigned after Mr. Trevitt moves to Beaufort. However, two options are available. One option would be to have Mr. Means assume more of the responsibility for the cable company in which he owns a 10% interest and reduce his responsibility at the radio station. Another option would be the possibility of selling the radio station so that Mr. Means could devote his full time to the cable system. Mr. Means was in charge of both the radio station and the cable system on a day-to-day basis for a period of time prior to Mr. Trevitt's move to Chatsworth. Tr. 480, 483.

14. Upon grant of BCBC's application, Mr. Washington, the owner of a 15% partnership interest in the applicant, will become the community affairs director for the station. He will also assume responsibility for the administration and implementation of the station's Equal Employment Opportunity Program and will produce some public affairs programs to be broadcast over the station. BCBC Exh. 7, pp. 2–4.

15. Mr. Washington is a black resident of Beaufort, South Carolina. He was born in Ritter, South Carolina, approximately 30 miles from Beaufort, on October 12, 1913. His parents were farmers and natives of the area where he was born. In 1927 he came to Beaufort County to attend the Beaufort County Training School from which he was graduated in 1932. After graduation he continued to live in Beaufort and began working as a waiter at the Gold Eagle Tavern, a world-renowned eating establishment in Beaufort. He is married and has seven children, all of whom graduated from high school and college and three of whom have obtained advanced college degrees. BCBC Exh. 7, p. 1.

16. Mr. Washington continued to work for the Gold Eagle Tavern until he was drafted into the U.S. Marine Corps in 1944. He remained in the Marine Corps for 26 years before retiring in 1970 with the rank of Master Gunnery Sergeant, the highest enlisted rank in the Marine Corps. While serving in the Marine Corps, he was Chief Steward for two years to the Assistant Commandant in

Washington, D.C. and for four years following that he was Chief Steward to the Commandant of the Marine Corps. During the $5^1/_2$ years prior to his retirement, he managed the Marine Corps School for Stewards. While in the Marine Corps, Mr. Washington kept his home in Beaufort, and his family continued to reside there for most of that time. All of his children were graduated from high school in the city of Beaufort. BCBC Exh. 7, p. 1.

17. Mr. Washington has been a lifelong member of the African Methodist Episcopal Church and is now a member of the Grace A.M.E. Church in Beaufort, where he has taught Sunday School and been on the Board of Trustees for the past eight years. He has also been Chairman of the Beaufort District Layman Organization of the A.M.E. Church for the past eight years. He has served on the Beaufort Housing Authority for the past six years. He has also served on the Board of the Beaufort Day Care Center for more than the past six years, and has been a member of the Advisory Committee of the Neighborhood Youth Center to the Beaufort City Council for the past ten years. BCBC Exh. 7, pp. 1–2.

*Barnacle Broadcasting Ltd.*

18. Barnacle is a corporation organized and existing under the laws of the state of South Carolina. It has one class of common stock, with one hundred shares authorized and subscribed. Its officers, directors and shareholders are as follows:

| *Name* | *Office* | *Shares Subscribed and Percentage of Voting Stock* | |
|---|---|---|---|
| Frieda R. Mitchell | President and Director | 20 Shares | 20% |
| Audubon Broadcasting Company, Inc. | – | 80 Shares | 80% |
| Pegram Harrison | Treasurer and Director | – | – |
| Ann M. Harrison[3] | Vice President, Secretary and Director | – | – |

Barnacle Exh. 7, p. 14; Exh. 8, p. 4; Tr. 677, 810.

19. Audubon Broadcasting Company, Inc., licensee of WNOK-AM and WNOK-FM in Columbia, South Carolina, is organized under the laws of the state of South Carolina. It has one class of common

[3] Ann M. Harrison is Mr. Harrison's wife. She has no interest in the media of mass communications other than her interest in Audubon Broadcasting Company, Inc., and through that, her interest in Barnacle. Barnacle Exh. 9.

stock, with one hundred thousand shares authorized and issued. Its officers, directors and shareholders are as follows:

| *Name* | *Office* | *Shares Subscribed and Percentage of Voting Stock* |
|---|---|---|
| Pegram Harrison | President, Treasurer and Director | 51,000 Shares 51% |
| Ann M. Harrison | Vice President, Secretary and Director | 49,000 Shares 49% |
| Earl D. Hewlette[4] | Director | – – |
| William L. McElveen[5] | Vice President | – – |
| Barnacle Exh. 7, pp. 14-15; | Exh. 8, pp. 4-5. | |

20. Frieda R. Mitchell, president, a director and 20% stockholder of Barnacle, will serve as full-time general manager of Barnacle's proposed station. Upon completion of construction, Mrs. Mitchell will resign her present position as Director of United Communities for Child Development and will devote full time (*i.e.*, 40 hours per week or more) to running the station. Her duties will include superintending the station's staff, developing program formats, selecting music and supervising the station's programming, including public affairs. Barnacle Exh. 7, p. 16; Exh. 8, p. 6.

21. Mrs. Mitchell resides in Sheldon, South Carolina, which is in Beaufort County. She was born in Sheldon, South Carolina on June 20, 1925. She is divorced and the mother of two daughters. She is also the grandmother of two children. Barnacle Exh. 7, p. 1.

22. Mrs. Mitchell attended Mather School for Girls, a private boarding school in Beaufort, for five years. She graduated at the head of her class there in 1944. The Mather School for Girls is no longer operating, but has been replaced by a Technical Education College. Barnacle Exh. 7, p. 1.

23. Mrs. Mitchell attended Allen University in Columbia, South Carolina. The only career offered by this university was that of public school teacher, and she took general education courses in preparation for teaching in the public schools. Barnacle Exh. 7, p. 1.

24. During 1946 through 1947, Mrs. Mitchell taught elementary

[4] Mr. Hewlette is an attorney in Columbia, South Carolina, whose only interest in or connection with the media of mass communications is as a director of Audubon Broadcasting Company, Inc. Barnacle Exh. 9.

[5] Mr. McElveen is general manager of WNOK-AM and WNOK-FM. He has no other interest in or connection with the media of mass communications. Barnacle Exh. 9. He assisted with Barnacle's application in the early stages and will assist Mrs. Mitchell in getting the proposed station off the ground. Tr. 775–76.

school in Jasper County, South Carolina; and in 1947 through 1948, she taught school in the Beaufort County School District. In 1948 she went to New York and did factory and domestic work and odd jobs until 1951. Beginning in 1951, she worked as a Supervisor of Ward Clerks at Grasslands County Hospital in Valhalla, New York until July 1952. In July 1952, she returned to South Carolina and was unemployed until 1959. From 1959 to 1961, she was a receptionist for the Clemson Extension Service, U.S. Government, in Beaufort. From 1961 to 1963, she was employed by the Beaufort County Board of Education, Dale Elementary School, Dale, South Carolina. From 1963 until 1974, she was employed by the Penn Community Services, Inc. located in Frogmore, South Carolina; and from 1974 to the present, she has been employed as Executive Director of United Communities for Child Development in Beaufort. Barnacle Exh. 7, pp. 1–2.

25. In 1963 Mrs. Mitchell was the primary organizer of the residents of Sheldon Community and formed a non-profit corporation which provided a number of services to the community. Barnacle Exh. 7, p. 2.

26. Mrs. Mitchell served as chairman of a citizens organization formed in 1965 which was largely responsible for preparing the community for making the transition from a segregated to an integrated school district. As a result of the activities of this organization, the second highest number of black students in all school districts in South Carolina transferred to integrated schools under the "Freedom of Choice" plan. Barnacle Exh. 7, p. 2.

27. Mrs. Mitchell has also served on the School Desegregation Task Force in South Carolina, a project sponsored by the American Friends Service Committee. Barnacle Exh. 7, p. 2.

28. Mrs. Mitchell served as a consultant to many community and state groups and organizations dealing with a variety of matters, but mainly pertaining to community organization. She served as a consultant to the Education Staff Seminar of the U.S. Office of Education, Title I, NAACP Legal Defense Fund, and as a consultant to the University of South Carolina School Desegregation Center. Barnacle Exh. 7, p. 2.

29. Mrs. Mitchell has served on numerous boards and committees at the state, regional and national levels. She has also served on the Advisory Committee of the Children's Defense Fund, a national non-profit child advocacy organization. Barnacle Exh. 7, p. 3.

30. Mrs. Mitchell served as chairman of a coalition consisting of several national private organizations which came together to protest the exclusion of poor and minority people by the U.S. Office of Child Development in the process of revising the National Licensing Standards for Publicly Funded Day Care Centers. The Office of Child Development appropriated funds to hold ten workshops across the country to allow the excluded groups to review the

proposed changes in the codes and make their recommendations. Barnacle Exh. 7, p. 3.

31. Mrs. Mitchell served two two-year terms on the Board of Directors of the South Carolina Council on Human Relations. She has also served on the South Carolina Advisory Committee to the U.S. Commission on Civil Rights for four years. Barnacle Exh. 7, p. 3.

32. While at Penn Community Services, Mrs. Mitchell directed a project in community development serving rural, poor and predominantly black people in the Low Country of South Carolina. During this period, her field activities led her into many extremely poor communities where families were experiencing hardships which she testified were unbelievable. She assisted poor blacks to organize child care centers where their very young children could be cared for while they were out to seek work. Barnacle Exh. 7, p. 3.

33. In two years, Penn Community Services was able to obtain foundation grants to assist in giving technical aid to these groups. In 1971 a federation of community day care centers was organized under Mrs. Mitchell's direction. This federation is currently operating as an independent agency servicing approximately 200 preschool children. Major funding for the program is derived from federal funds under Title XX, as well as a combination of local, state and private funds. Barnacle Exh. 7, p. 4.

34. Mrs. Mitchell served as Chairman of the United Communities for Child Development, a federation of community-operated child care centers in South Carolina, until it received public funding in 1974, at which time she became Executive Director. Barnacle Exh. 7, p. 4.

35. Mrs. Mitchell was elected to the Beaufort County Board of Education in 1968, and she is currently serving her thirteenth year on that board. Mrs. Mitchell testified that she believes that she and another black woman elected at the same time were the first black women to be elected to a public office in the state of South Carolina. Barnacle Exh. 7, p. 4.

36. In 1977 Mrs. Mitchell was one of seven recipients, out of 125 national nominees, of the 1977 Rockefeller Public Service Award for Outstanding Public Service. Barnacle Exh. 7, p. 4.

37. Recently Mrs. Mitchell served as a gubernatorial appointee to the South Carolina Committee for the International Year of the Child, and she was also a member of the Beaufort County Planning Committee of the White House Conference on Families. Barnacle Exh. 7, p. 4; Tr. 941, 989–91.

38. Mrs. Mitchell now serves on the Board of Directors of Beaufort County United Funds; the Budget and Allocations Committee of Beaufort County United Funds; the Advisory Council for Coastal Speech and Hearing; and the Beaufort County Literacy Program of which she is a board member. Barnacle Exh. 7, pp. 4–5.

39. Mrs. Mitchell is also currently serving a four-year gubernato-

rial appointment to the Citizens Participation in Education Task Force, and is a member of the South Carolina Mental Health State Plan Advisory Committee. Also she is serving as a member of the Advisory Board for the Adult Education Program, as Secretary on the Board of Directors of the Sheldon Community Center, and as a member of the Task Force to Review Minimum Defined Programs for the State of South Carolina. Barnacle Exh. 7, p. 5.

40. Mrs. Mitchell has no interest of any kind in any mass medium of communications other than her interest in Barnacle. Barnacle Exh. 7, p. 5. She has no experience in broadcasting apart from her role in connection with Barnacle's application. Barnacle Exh. 10, p. 1.

41. Pegram Harrison, treasurer and a director of Barnacle, will not devote full time to the station, but will devote 20 hours or more per week to the management and operation of the station. He will visit the station on the average of once a month, or more often, during the start-up period. Barnacle Exh. 7, p. 16; Exh. 8, p. 6.

42. Mr. Harrison was born on January 4, 1934 in New Orleans, Louisiana. He is married and has four sons. He resides in Atlanta, Georgia. Barnacle Exh. 8, p. 1.

43. Mr. Harrison received his primary education at public schools in Atlanta, Georgia. From 1947 to 1951, he attended Episcopal High School in Alexandria, Virginia, from which he graduated with academic honors. From 1951 to 1955, he attended Washington & Lee University in Lexington, Virginia, from which he also graduated with academic honors. While there he was involved in varsity athletics and served as president of his social fraternity. He was a lieutenant in the U.S. Naval Reserve from 1955 to 1957 and he served as Executive Officer and Navigator of the U.S.S. Albatross. From 1957 to 1960, he attended the Harvard Law School in Cambridge, Massachusetts, and graduated in the upper third of his class. Barnacle Exh. 8, p. 1.

44. Mr. Harrison was employed from 1960 to 1964 by Miller, Martin, Hitching & Tipton in Chattanooga, Tennessee, a firm involved in the general practice of law. During this time, he was Chancery Court Special Master for Professional Ethics and served on various civic and corporate boards. He was also a Trustee of the Hunter Gallery of Art and the Chattanooga Symphony Association and was an Assistant Professor of English at the University of Chattanooga. Barnacle Exh. 8, p. 1.

45. Mr. Harrison was employed with the firm of Royall, Koegel and Rogers in New York, New York from 1964 to 1967. His practice there involved corporate litigation, securities registration, acquisitions and mergers. He participated as counsel and principal in the formation of a group broadcasting company, and was a member of the Bar of all New York courts of record. He was also a member of

the Association of the Bar of the City of New York, the Harvard Club and the River Club of New York City. Barnacle Exh. 8, p. 2.

46. From 1967 to 1971, Mr. Harrison was a partner with the firm of Jones, Bird & Howell in Atlanta, Georgia, specializing in general corporate practice, including private and public corporate finance and municipal bond issues, and in criminal appellate work. He was trial counsel for Southern Railroad Company and general counsel for Pacific and Southern Broadcasting Company. Barnacle Exh. 8, p. 2.

47. Mr. Harrison practiced law individually from 1971 to 1978, representing a variety of corporate and individual clients and administering personal and family business interests in real estate and bottling. Barnacle Exh. 8, p. 2.

48. During 1975 Mr. Harrison served as Director of the Bureau of Planning and Administration of the Department of Aviation for the city of Atlanta. He administered relations between the city and concession operators at the second busiest airport in the world. He negotiated agreements between the city and the State Department of Transportation, the Federal Highway Department and the Federal Aviation Administration to finance and accomplish relocation of Interstate Highway I-85. He participated in the development of architectural and engineering plans for the recently completed Atlanta airport. He negotiated airport use agreement terms with airlines and represented the Department of Aviation before the Mayor and the City Council. Barnacle Exh. 8, pp. 2–3.

49. From 1978 to present, Mr. Harrison has been president of the Audubon Broadcasting Company and has been actively engaged in the management of radio stations WNOK-AM and WNOK-FM in Columbia, South Carolina. He owns no other interest of any kind in any mass medium of communications other than his interest in Barnacle. Barnacle Exh. 8, p. 3.

50. Mr. Harrison has been a member of the Vestry of All Saints Episcopal Church, a Trustee of St. Jude's House for Alcoholics and a member of the Georgia Ornithological Society and the Atlanta Humane Society. He is a private pilot, instrument rated. Barnacle Exh. 8, p. 3.

*The Communities: Section 307(b) Issue*

51. A Section 307(b) issue was designated because the applicants have filed for different communities. Specifically, BCBC has filed for Beaufort, South Carolina as its community, whereas Barnacle has specified Port Royal, South Carolina.

52. The town of Port Royal and the city of Beaufort are neighboring municipalities located in Beaufort County, South Carolina. BCBC Exh. 3; Exh. 4; Tr. 179–80. The 1970 and 1980 populations of Beaufort and Port Royal, and the percentage of change from 1970 to 1980, are as follows:

| | *1970* | *1980* | *Change* |
|---|---|---|---|
| Beaufort | 9,434 | 8,634 | –8.5% |
| Port Royal | 2,865 | 2,977 | +3.9% |

BCBC Exh. 11, p. 2.

The number of housing units in Beaufort and Port Royal in 1970 and 1980, and the percentage of change from 1970 to 1980, are as follows:

| | *1970* | *1980* | *Change* |
|---|---|---|---|
| Beaufort | 3,366 | 3,533 | + 5.0% |
| Port Royal | 1,017 | 1,209 | +18.9% |

BCBC Exh. 11, p. 2.

53. The town of Port Royal was founded in 1562. Tr. 218. In 1874 the town was incorporated and its physical limits established by the state of South Carolina. Barnacle Exh. 6; Exh. 6A. In 1932 the town surrendered its Charter and accepted incorporation. Barnacle Exh. 6C, p. xiii.

54. Port Royal operates on the "council-manager" form of municipal government, with a mayor and four council members elected at large for a four-year term. The mayor and council members are not full-time employees of the town, and are paid a token salary of $150 and $75 per month, respectively. Barnacle Exh. 6C, p. 59; Tr. 189. The council is the legislative body of the town (Tr. 190) and is empowered to adopt ordinances and resolutions considered "necessary or proper to the proper functioning and benefit of the town." Barnacle Exh. 6C, p. 64. The town manager is appointed by and serves at the pleasure of the council. Barnacle Exh. 6C, p. 66. The town manager is the "executive" (Tr. 190) and is responsible for the "proper administration of all affairs of the town." Barnacle Exh. 6C, p. 67. The council also appoints the town "clerk and treasurer." Barnacle Exh. 6C, p. 68.

55. The Public Safety Department of Port Royal is headed by the Director of Public Safety and includes the town's police officers and firefighters. Barnacle Exh. 6C, p. 70. At present the town has 13 full-time employees in this department.[6] Barnacle Exh. 6D; Tr. 191. In addition, there are 9 volunteer firemen and 10 volunteer "reserved" police officers who are not employees of the town. Barnacle Exh. 6D; Tr. 192, 203–04, 206.

56. Port Royal has a municipal court, established for and having jurisdiction over the trial and determination of all cases arising out of the Code of Ordinances of the town. The court also has the same jurisdiction in criminal matters as is conferred by state law upon magistrates. The court has no jurisdiction in civil matters. Barnacle Exh. 6C, pp. 76–77. The municipal judge is elected by the council for

[6] Included in this figure is the Director of Public Safety, Bruce Drawdy, who is also the Acting Town Manager. Tr. 169–70.

a term of four years (Barnacle Exh. 6C, p. 75) and is paid an annual retainer of $2,400. Tr. 192. The present judge also engages in the practice of law and has offices located in the city of Beaufort. Tr. 192–93.

57. The Town Attorney is appointed by and serves at the pleasure of the council. The Town Attorney is the chief legal advisor to the town and represents the town in all legal proceedings. Barnacle Exh. 6C, p. 60. Port Royal presently retains a law firm to act in this capacity. The law firm has its offices in the city of Beaufort and is paid an annual retainer of $500-$1,000. Tr. 193, 197.

58. The Board of Adjustment and Appeals is composed of five persons, appointed by the mayor and council, who serve on an unpaid, voluntary basis. The Board meets whenever there is a controversy or disagreement as to zoning. Although the Board is not empowered to change the zoning, it can make adjustments thereto. The Elections Commission is composed of three persons who serve on an unpaid, voluntary basis. Barnacle Exh. 6C, p. 360; Exh. 6D; Tr. 204–06.

59. The town of Port Royal owns two or three buildings, as well as small areas of real estate. The employees of the town work in either the municipal building or the public works building. Tr. 200–01.

60. In addition to those enumerated above, Port Royal employs the following numbers of persons on a full-time basis in the capacities indicated: one custodian who is responsible for the care of the municipal building; two persons responsible for streets and sanitation; one mechanic; and eight persons in the water department. Barnacle Exh. 6D; Tr. 202–03.

61. The Code of Ordinances of the town of Port Royal, effective August 13, 1980 (Barnacle Exh. 6C, p. ix), contains chapters relating to: animals and fowl (*Id.* at pp. 127–38); buildings, construction and related activities (*Id.* at pp. 189–207); cemeteries (*Id.* at p. 255); civil emergencies and disaster preparedness (*Id.* at pp. 305–08); elections (*Id.* at pp. 359–62); finance (*Id.* at p. 413); health and sanitation (*Id.* at pp. 563–68); mobile homes, mobile home parks, apartments and other rental dwellings (*Id.* at pp. 619–21); occupational licenses and regulations (*Id.* at pp. 671–709); offenses and miscellaneous provisions (*Id.* at 761–71); personnel (*Id.* at pp. 817–48); streets and sidewalks (*Id.* at pp. 899–904); taxation of property (*Id.* at pp. 955–61); traffic (*Id.* at p. 1011); and utilities and services, including water, sewers and refuse collection (*Id.* at pp. 1061–1107). In addition, the town of Port Royal has a zoning ordinance, a subdivision ordinance and ordinances granting a CATV franchise and an electricity franchise. *Id.* at pp. 1157, 1257, 1357.

62. The town of Port Royal levies its own taxes to provide such services to its residents as police and fire protection. The tax bills are sent out and collected by Beaufort County on behalf of Port Royal.

The town pays the county a fee for performing these functions. Tr. 224, 228. The town owns, operates and maintains all of its sewer lines and is responsible for billing its customers. Tr. 237–38. Port Royal's sewage is treated at a sewage treatment plant located in the city of Beaufort. Tr. 218. This plant was built with funds allocated by the Federal Government to both Port Royal and the city of Beaufort. The city of Beaufort bills Port Royal for its proportionate share of the costs of operating, maintaining and administering this plant. Tr. 256–57.

63. The Port Royal Elementary School is located in the town of Port Royal and is attended by approximately 150–200 students in grades 1 through 6. The students are residents of Port Royal. Tr. 183, 246. The school is operated and the building and facilities are maintained by Beaufort County. Tr. 188, 207, 233. The Beaufort County Board of Education operates all public schools in the county, and all county residents are taxed equally to support those schools. Tr. 188–89, 233. According to Bruce Drawdy, the acting town manager (Tr. 170), the possibility of closing this school has been mentioned in the past few years. However, the citizens of Port Royal have submitted written objections to the school Board stating that they would like this school to remain open. Tr. 244–46. If this elementary school ever closes, the building and the real estate upon which it is built will become the property of Port Royal. Tr. 207–08. Port Royal children attend junior high school and high school in the city of Beaufort. Tr. 183–84. There are no private schools located in Port Royal. Tr. 233–34.

64. The town of Port Royal owns, operates and maintains a recreational facility located on the grounds of the elementary school and has built tennis and basketball courts at that facility. Tr. 207–08, 235. Port Royal also owns and operates another park, approximately two years old, which has a baseball field, a basketball court, swings, slides and water fountains. Tr. 234. In addition, two other parks have been planned and funded, but have not as yet been built. Tr. 234–35. There is a municipal swimming pool located in the city of Beaufort which residents of Port Royal may use. This pool was built by the city utilizing funds from the Federal Government. Tr. 224. There are no private country clubs, pools or tennis courts located in Port Royal. Nor does Port Royal have a YWCA or a YMCA. Tr. 235. There are no movie theaters located in Port Royal. Tr. 212. The Beaufort County Library is located in the city of Beaufort. Tr. 229. The Live Oak Recreation Club, located in Port Royal, provides entertainment and recreation for senior citizens and the youth of Port Royal. Tr. 271. The Ribaut Recreation Club plays an important role in communicating with the senior citizens and the youth of Port Royal. Tr. 243.

65. Located in the town of Port Royal are between 8 and 13 houses of worship of various denominations. Tr. 235. There are also boy and girl scout troops, a fire department ladies auxiliary and an

Eastern Star located in Port Royal. There are several Masonic Lodges located in Port Royal and a Masonic Hall is located in the city of Beaufort. An Amvets Post, chartered in Port Royal, is also located in the city of Beaufort. Tr. 239–40. The United Way Campaign is a Beaufort County endeavor in which Port Royal participates. Tr. 240–41.

66. According to the acting town manager, there are no attorneys, medical doctors or dentists with offices located in Port Royal. Tr. 209. Medical emergencies are handled by the Beaufort County Memorial Hospital which is located in the city of Beaufort. Tr. 232–33; BCBC Exh. 3. However, the U.S. Naval Hospital, which is the largest medical facility in the county, is located in Port Royal. BCBC Exh. 3; Barnacle Exh. 6B; Tr. 239. Also located in Port Royal are a county-owned and operated speech and hearing clinic providing care and training for handicapped children from Beaufort County and a state-operated community rehabilitation center providing training for mentally retarded persons. Tr. 238–39, 259–60.

67. The business area of Port Royal is located along Ribaut Road, which is South Carolina highway 281. This road goes through and serves both Port Royal and the city of Beaufort. There is also a business district along Paris Avenue in the old part of Port Royal. BCBC Exh. 3; Barnacle Exh. 6B; Tr. 209-10, 230, 266. In addition, the Royal Oaks Shopping Center is located in the northern part of Port Royal. Tr. 210–11. The Bank of Beaufort has a branch office located in that shopping center. There are no other banking facilities located in Port Royal. Tr. 222. Some of the chain stores operating in Port Royal are: A&P grocery store, Mack's Variety Store and Majik Market. Tr. 250–51. The South Carolina Ports Authority operates a shipping terminal in Port Royal. Although the land and the terminal are owned by the state, they are leased to and operated by private shippers. BCBC Exh. 3; Barnacle Exh. 6B; Tr. 214, 235–36.

68. Harris Atlantic Seafood Company, operated by Blue Channel Corporation, is one of the largest wholesale and retail seafood processors and is the largest canner and shipper of blue crab meat in the United States. Tr. 251, 268–69. Harris has its main office and a receiving plant in Port Royal. Harris is presently developing a 300-foot extension to its dock in Port Royal. Tr. 251, 268. Until approximately two or three years ago, Harris had its processing plant in Port Royal. This has been moved, however, to the Burton area, which is approximately five miles northwest of Port Royal. BCBC Exh. 4; Tr. 267.

69. There is no chamber of commerce in Port Royal. Businesses located in Port Royal are members of the Beaufort County Chamber of Commerce. Tr. 221, 252. There are no automobile dealerships or newspapers in Port Royal. Tr. 221–22. However, the *Beaufort Gazette* is published five days a week in the city of Beaufort. Tr. 237. There are two motels located in Port Royal, the Beaufort Court Motel and

the Port Royal Inn, having approximately 15 and 40 rooms, respectively. Tr. 212–13. There are 38 apartments being developed on the west side of highway 281 near Hillside Court. Barnacle Exh. 6B; Tr. 249. The town of Port Royal is served by a county-operated bus system which runs through the town as well as through the remainder of Beaufort County. Tr. 233. A U.S. Post Office and the South Carolina Wildlife Department are located in Port Royal. Tr. 235–36.

70. There is a proposal by the South Carolina Ports Authority to build a seafood industrial park in Port Royal. Tr. 213–15. If completed, this project will be one of the largest seafood receiving and processing plants on the east coast. Tr. 273–74. Federal funds in the amount of $2 million were appropriated for the planning of this project. Tr. 334. In addition, Port Royal received a $280,000 grant from HUD and has built a sewer line for the purpose of providing sewage services to the seafood industrial park as it develops. The sewer line also provides services to the residences in that area. Tr. 215–17. According to James G. Thomas,[7] a lifelong resident of the city of Beaufort, funds for this project as well as others were included in a bill passed by both houses of the South Carolina legislature and sent to the Governor for his signature. The Governor, however, vetoed this bill, stating that the reason for his action was a shortage of funds. The Governor's veto was not overridden by the legislature. Tr. 330–32, 335–37. According to Mr. Thomas, the seafood industrial park is a "pet project" of a "very influential" state senator who has "vowed" to "push" this project through. Tr. 331–32. Mr. Thomas, however, was of the opinion that the project is now "almost dead." Tr. 330.

71. The McTeer Bridge, which crosses the Beaufort River, is located in the northeast portion of Port Royal and connects Port Royal on the west with Ladies Island on the east. BCBC Exh. 3; Barnacle Exh. 6B; Tr. 246–47. The bridge serves as the main roadway for traffic flowing from Paris Island (located to the south and southwest of Port Royal) to Ladies Island and Frogmore (located to the east of Port Royal). BCBC Exh. 4; Tr. 248. The bridge allows motorists to bypass the city of Beaufort (Tr. 264), and has increased the traffic flow through Port Royal. Tr. 248. There are approximately 24 acres of land at the Port Royal end of the bridge, and there is a proposal to build 55 townhouses on 9 of those acres. The remainder of the 24-acre tract is being cleared for future development. A drawing has been submitted to Port Royal for a complete shopping center for that area, and an inquiry has been made with respect to obtaining a building permit for an $800,000 building. Tr. 247. The completion of the McTeer Bridge has also caused business people to

[7] Mr. Thomas is 64 years old (Tr. 337–38) and has been a participating attorney for 41 years. Tr. 317.

inquire into Port Royal's zoning ordinaces and the acquisition of land, which was not previously available, for commercial development. Tr. 248–49, 265.

72. Port Royal has no local broadcast transmission service of any kind. The city of Beaufort has three such transmission services as follows:

WQLO-FM, Channel 254, 36 kW, 225 feet, Class C
WBEU-AM, 960 kHz, 1 kW, Day, Class III
WSIB-AM, 1490 kHz, 0.25/0.5 kW-LS, U, Class IV

Barnacle Exh. 5, p. 2. WQLO and WBEU are co-owned and operated. Tr. 567. The town of Port Royal and the city of Beaufort receive the same number of services. Tr. 60.

*Rule 1.65 Issue Against BCBC (Issue 1)*

73. BCBC's application was filed with the Commission on September 18, 1979. The application proposed the construction of a guyed antenna tower having an overall height above ground (including obstruction lighting) of 298 feet. The application indicated that the FAA office in Atlanta, Georgia had been notified of the proposed construction. Barnacle Exh. 1, pp. 1, 4 and 7. On November 30, 1979, the FAA issued a Determination of No Hazard To Air Navigation approving construction of the tower proposed in BCBC's application. Barnacle Exh. 2, p. 15. However, on December 28, 1979, an official of the FAA informed BCBC that a petition for discretionary review of the determination of no hazard had been filed and that, pending consideration of the petition, the no hazard determination would not become final. Barnacle Exh. 2, p. 14. On February 12, 1980, the FAA issued a Notice of Petition For and Grant of Review indicating that a review of the no hazard determination would be conducted and inviting interested persons to submit information in writing on or before March 13, 1980. However, BCBC's engineer, Palmer A. Greer, to whom the applicant had delegated authority to deal with the FAA, did not receive the notice until March 8, 1980. Barnacle Exh. 2, pp. 9, 11–13; Tr. 93, 146.

74. After the decision to review the no hazard determination was made, Mr. Greer talked with an FAA staff member who indicated that in the event the determination of no hazard was reversed, the FAA would approve a tower on the same site with height reduced to 139 feet. Tr. 134. Mr. Greer then determined that BCBC could, if necessary, amend its application to propose the lower height and still meet all of the technical requirements in the Commission's Rules for a station licensed to Beaufort. He also determined that an amendment proposing the reduced tower would not be a "major" amendment under the Commission's Rules. BCBC Exh. 1, p. 3; Tr. 113, 150–53.

75. During March of 1980, Mr. Greer was aware of a pending

petition for rulemaking requesting deletion of channel 285A from Beaufort and the substitution of another channel, either 261A or 259C, in lieu thereof. Tr. 94–95. Mr. Greer knew that if channel 259C were substituted for channel 285A, BCBC would be required to find a new antenna site because the site specified in its application did not meet the mileage separation requirements of the Commission's Rules for channel 259C. BCBC Exh. 1, p. 3; Tr. 94–95.

76. On March 27, 1980, Mr. Greer filed comments with the FAA on behalf of BCBC urging that the determination of no hazard be affirmed. Barnacle Exh. 2, p. 7. However, on May 7, 1980, the FAA ruled against BCBC, reversed its earlier determination of no hazard and issued a determination that the proposed tower would be a hazard to air navigation. Barnacle Exh. 2, pp. 3–6. By letter dated May 12, 1980, this determination was forwarded to BCBC in a letter which suggested that the applicant contact the FAA to discuss an acceptable site location for the tower. Barnacle Exh. 2, p. 2.

77. Two days later, on May 14, 1980, the Chief of the Broadcast Bureau's Policy and Rules Division released a *Notice of Proposed Rule Making* in BC Docket No. 80–214 (45 Fed. Reg. 34934, published May 23, 1980), proposing to delete channel 285A from Beaufort, South Carolina and substitute channel 261A or channel 259C in lieu thereof. The notice acknowledged that the BCBC application was pending and that BCBC could not operate on channel 259C from the site proposed in its application. The Commission noted that while the substitution of channel 259C for channel 285A would further the public interest by eliminating the intermixture of Class A and Class C channels in Beaufort, it believed that an alternative proposal to assign a Class A channel should be included so that BCBC "... would have an opportunity to indicate whether it would apply for the Class C assignment or whether it desires to amend its application specifying Channel 261A." BCBC was requested to submit comments on the alternative proposals and, if it desired to apply for the Class C channel, to submit additional technical data describing the impact such an assignment would have on the Commission's ability to make additional FM channel assignments in the future. Mr. Greer prepared an engineering statement which was filed with the Commission with BCBC's comments in response to the notice. BCBC urged the Commission to substitute channel 259C for channel 285A. Barnacle also filed comments in BC Docket No. 80–214 indicating its willingness to amend its application[8] to specify either of the alternative channel assignments proposed by the Commission. Barnacle had made a determination that it would rather have the Class C channel substituted than the Class A and, therefore, did not oppose the substitution of channel 259C. No comments were filed

[8] The Barnacle application proposing the use of channel 285A at Port Royal was filed with the Commission on May 19, 1980.

with the Commission opposing the assignment of channel 259C to Beaufort (*Beaufort-Ridgeland, South Carolina*, 48 RR 2d 1559 (1981)). BCBC Exh. 1, p. 3; Tr. 635–37.

78. Mr. Greer was of the opinion in May of 1980 that the Commission would ultimately assign channel 259C to Beaufort and knew that if the substitution was made, BCBC would be required to obtain a new tower site and submit an entirely new engineering statement to the Commission in order to amend its application to propose operation on the channel. BCBC Exh. 1, p. 3; Tr. 143–44. After learning of the FAA's action determining that the proposed tower was a hazard to air navigation, Mr. Greer talked with a member of the FAA's staff in Atlanta and again reviewed the maximum tower height the FAA might approve at the site specified in the application. In this conversation, Mr. Greer was again assured that a tower height of 139 feet at the location specified in the application would still be acceptable to the FAA. Tr. 135. After considering the proposed action of the FCC and the FAA hazard determination, Mr. Greer discussed BCBC's options with Mr. Trevitt and the applicant's communications counsel. They considered several options: (a) BCBC could obtain a new antenna site and submit to the Commission a new engineering amendment specifying use of a 300 foot tower at the new site; (b) it could submit an engineering amendment reducing the height of its proposed tower at the site already specified in the application; or (c) it could wait until the Commission acted on the rule making proposal, at which time Mr. Greer felt it would be necessary to find a new site and submit to the Commission a new engineering statement proposing use of channel 259C. Since Mr. Greer was confident that the Commission would ultimately make the Class C channel assignment, he considered the first two alternatives to be a duplication of effort and expense. Therefore, at Mr. Greer's suggestion, BCBC decided to wait until the outcome of the rule making proceeding before preparing and filing an amendment to its application. BCBC Exh. 1, p. 3; Tr. 95, 98, 144, 146–47.

79. During the discussions which led to this decision, no one mentioned reporting the FAA's determination to the Commission. Mr. Greer has dealth with the FAA and its predecessor agencies on matters concerning the erection of broadcast towers for some 35 years. It has been his experience that FAA hazard determinations were routinely reported to the FCC by the FAA. Since he knew the FCC would learn of the hazard determination from the FAA, Mr. Greer never considered filing a duplicate notification on behalf of BCBC. In his discussions with Mr. Trevitt and communications counsel, no one mentioned the possibility of reporting the matter to the Commission. BCBC Exh. 1, pp. 3–4; Tr. 96–97, 107, 111.

80. On or about August 27, 1980, Mr. Greer received a telephone call from a staff attorney in the FM Branch of the Commission's

Broadcast Bureau who indicated that an amendment to the BCBC application should be filed in order to alleviate the airspace problem facing the BCBC application. Mr. Greer informed the attorney that he had discussed the matter with the FAA and believed the FAA would approve a tower on the site proposed in the application as long as the tower did not exceed a height of 139 feet. The Commission attorney indicated that while the last date for filing major amendments to the BCBC application was August 28, 1980, an amendment reducing the height of the proposed tower to 139 feet would be a "minor" amendment which could be filed after that date. After this telephone call, Mr. Greer discussed the matter with his client and BCBC's attorney and they decided to go ahead and prepare an amendment specifying a reduction in antenna height at the site proposed in the application. Thereafter, on September 2, 1980, Mr. Greer prepared the engineering portion of the amendment and forwarded it to the applicant's attorney in Washington, D.C. BCBC Exh. 1, p. 2; Tr. 85, 105.

81. Meanwhile, on August 23, 1980, Mr. Trevitt had signed an amendment to the BCBC application which was later filed with the Commission on August 28, 1980. The amendment did not make any reference to the FAA determination. However, in his letter transmitting the amendment to the Commission, counsel for BCBC made the following statement:

> It should also be noted that there is presently pending before the Commission a Notice of Proposed Rulemaking in BC Docket No. 80–214 which proposes to amend the Commission's FM Table of Assignments by deleting Channel 285-A from Beaufort, South Carolina and replacing it with either Channel 261-A or Channel 259-C. The referenced application and that of Barnacle Broadcasting Ltd. both propose to construct new stations on Channel 285-A. However, all of the parties filing comments in the Rulemaking Proceeding urged the Commission to replace Channel 285 with Channel 259-C. Both Beaufort County Broadcasting Company and Barnacle Broadcasting Ltd. took the position that their status as "cut-off" applicants should not be disturbed in the event the Commission determines that the assignment of Channel 259-C to Beaufort in place of Channel 285-A is in the public interest, and that they should be permitted to submit new engineering data for their applications without losing their protected positions. . .

Barnacle Exh. 3, pp. 1–6.

82. Subsequently, on September 5, 1980, Barnacle filed a petition with the Commission requesting dismissal of the BCBC application for failure to report the FAA hazard determination under Rule 1.65. Since Barnacle had filed its petition on September 5, 1980, and Mr. Greer had prepared the engineering portion of the amendment on September 2, 1980, he was not aware of Barnacle's petition at the time he prepared the amendment. Mr. Trevitt was not aware of a specific rule requiring the reporting of significant changes in an application to the FCC within 30 days until after the filing of Barnacle's petition. While he was generally aware of a reporting

requirement, he relied upon his counsel and engineer to advise him concerning the applicability of such requirements. BCBC Exh. 1, p. 2; Tr. 105, 111, 113, 499–500, 502–03, 518.

83. The *Hearing Designation Order* containing this issue was released on January 15, 1981. Subsequently, on February 11, 1981, the Chief of the Broadcast Bureau's Policy and Rules Division released the *Report and Order* in *Beaufort-Ridgeland, South Carolina*, 48 RR 2d 1559 (1981), deleting channel 285A from Beaufort and substituting channel 259C in lieu thereof.

*Rule 1.65 Issue Against Barnacle (Issue 4)*

84. Mrs. Mitchell, who has had no experience in broadcasting apart from her role in connection with the Barnacle application, was first contacted by Pegram Harrison in the fall of 1979. As a result of their discussions, she agreed to join with him and Mrs. Harrison in an application for permission to use FM channel 285A to establish a radio station in Beaufort. She agreed, among other things, to help with the required ascertainment of community needs. Mr. Harrison furnished her with the FCC's 1971 *Ascertainment Primer* and with other materials relating to applications for broadcast stations. Barnacle Exh. 22, p. 1.

85. When the Harrisons and Mrs. Mitchell met later in Beaufort in early January 1980 to begin interviews (Tr. 681–83, 900), Mrs. Mitchell realized that there were two categories of interviews, namely, leader interviews and general public survey interviews, and that while the latter could be done under her supervision by prospective employees of the station (Tr. 930–31), the former were to be done in person by Mr. or Mrs. Harrison, or herself, *i.e.*, by principals. Barnacle Exh. 22, p. 1. All interviews done in early January 1980 when the Harrisons and Mrs. Mitchell met in Beaufort were done either by Mr. or Mrs. Harrison or by Mrs. Mitchell and the interview sheets used by Barnacle for its survey were signed or initialed by the interviewer, as well as by a reviewer, and then forwarded to Barnacle's communications counsel. BCBC Exh. 17. Among leaders interviewed by Mrs. Mitchell before April 1980, which interviews were ultimately used for Barnacle's Port Royal survey, were Messrs. Parker, Goodwine, Murray, Sergeant Coldwell, Major Paulson and Ms. Drake. Barnacle Exh. 22, pp. 1–2. Persons interviewed by Mr. and Mrs. Harrison, which interviews also were ultimately used in Barnacle's application, included Ms. Sides, Mr. Dore and Mrs. Green. Barnacle Exh. 22, p. 2.

86. Mrs. Mitchell arranged later for Sally Wilson, who was and is a prospective employee of the station (Barnacle Exh. 22, p. 2; Tr. 701–02, 885–86, 933–34, 948), to do some general public interviews pursuant to Mrs. Mitchell's direction and under her supervision. Mrs. Wilson was in early 1980 and is currently employed by the United Communities for Child Development as Mrs. Mitchell's

secretary. Mrs. Wilson, who has held this position since 1975, in fact functions as Mrs. Mitchell's office manager and administrative assistant. Mrs. Wilson's duties at the radio station will be similar to her duties at the United Communities for Child Development at the present time. Barnacle Exh. 22, p. 2. Mrs. Wilson did telephone interviews and filled out interview sheets by hand. With a few exceptions she did not sign these. Barnacle Exh. 20; Tr. 908. Mrs. Mitchell sent these interview sheets to Mr. Harrison with an undated note saying that she had paid to have them done. Mr. Harrison wrote back immediately on February 18, 1980 asking how much she had paid so that he could reimburse her in accordance with his promise to bear all such expenses. BCBC Exh. 19, pp. 1–2; Tr. 704–05. Mrs. Mitchell did not supply this information until April 1980. BCBC Exh. 19, pp. 3–5. Mr. Harrison forwarded the leader and public survey interview sheets furnished him by Mrs. Mitchell to Barnacle's communications counsel in Washington, D.C. Tr. 710.

87. In early April 1980, after a draft application (complete except for the legal, engineering and financial portions) for the city of Beaufort had been prepared, it was determined that additional categories of leaders should be interviewed. Tr. 988–89. Mrs. Wilson volunteered to do some of the interviews for Mrs. Mitchell, who was unusually busy at the time (Tr. 940–41, 947, 955), and Mrs. Mitchell accepted her offer (Tr. 946). Under Mrs. Mitchell's supervision, Mrs. Wilson interviewed Messrs. McTeer, Dafler, Kookman and Queener on April 7 and 8, 1980. At about the same time, April 8–11, 1980 (Tr. 941–42, 978), Barnacle determined that instead of applying for a station in the city of Beaufort, to which channel 285A was then assigned but which already has three radio stations, it could and should apply to use the same vacant channel to establish a first broadcast service for the town of Port Royal, which does not have a station. Barnacle Exh. 22, p. 2. Mrs. Mitchell accordingly undertook additional personal interviews for Port Royal to be used in place of interviews previously done for the city of Beaufort. Barnacle Exh. 22, p. 3. Mrs. Wilson also did some of these interviews under Mrs. Mitchell's supervision. Tr. 978–79, 1044.

88. Mrs. Mitchell was unusually busy during April 1980 because, in addition to her duties as executive director of United Communities for Child Development, she was preparing to be a panelist at the pre-conference meeting of the White House Conference on Families on April 9–11, 1980. Tr. 941, 947, 955. Mrs. Wilson realized this and volunteered to help. Since Mrs. Wilson had done a good job previously on the general public survey, Mrs. Mitchell happily accepted her offer. Tr. 947. She did not advise or consult with anyone about this decision. She had forgotten that leader interviews were to be done by other principals of Barnacle or by herself personally as a principal, and that only general public interviews were to be done by prospective station employees. Tr. 1061. Mrs. Mitchell believed that

it was all right for Mrs. Wilson to do interviews for her as long as she conducted the overall effort. She did not remember the different rules regarding who was to do the actual interviewing for purposes of the different categories of interviews. From April 1–8, 1980, Mrs. Mitchell interviewed Ms. Woodward, Dr. Washington, and Messrs. Ford and Washington. Mrs. Wilson, acting under Mrs. Mitchell's supervision, interviewed Messrs. McTeer, Kookman, Queener and Dafler on April 7 and 8, 1980, before the decision was made to apply for Port Royal, and Messrs. Vaughn, Waddell, Murray, Paskoff, Drawdy, Hough and Redmond, as well as Ms. Bishop, Ms. Parker, Ms. Boulware and Ms. Vaughn, on April 25, 1980, after the decision to apply for Port Royal had been made. Barnacle Exh. 22, p. 3.

89. The first interview sheets done by Mrs. Wilson in her April face-to-face leader interviews were not neat, and for that reason Mrs. Mitchell copied them over when she reviewed and signed them. Tr. 947. Other sheets done by Mrs. Wilson in April were neat and were not copied over. Mrs. Mitchell also reviewed and signed all these sheets, both those she had recopied and those that were in Mrs. Wilson's handwriting, to indicate that she took full responsibility therefor, but not intending to mislead anyone as to who had actually done the interviewing. Tr. 951. Had she intended to mislead anyone, she would not have sent Mrs. Wilson to interview people Mrs. Mitchell knew (Tr. 951), nor would she have forwarded most of the Wilson interview sheets written out by Mrs. Wilson, nor would she have dated her signature after the date shown on the sheets for the interviews. BCBC Exh. 21, pp. 6–11. Mrs. Mitchell then either forwarded the sheets to Barnacle's communications counsel in Washington, D.C. or sent them to Mr. Harrison who did so.

90. As a result of the decision to apply for a Port Royal station instead of another station for the city of Beaufort, the general public interviews done in the city of Beaufort by Mrs. Wilson in January were not used, nor were the previously done leader interviews unless they related to Beaufort County or surrounding areas at large. Barnacle Exh. 22, p. 4; Tr. 1106.

91. Mrs. Mitchell had her daughter, Karen Hawkins, who was and remains a prospective employee of Barnacle's proposed station, do a new general public survey. Mrs. Mitchell reviewed and signed all the interview sheets done by Mrs. Hawkins, indicating beside her signature the date of her review and signature which, as in the case of leader interviews done by Mrs. Wilson, was frequently different from the date shown on the face of the sheet for the interview itself, plainly indicating review, not performance, of the interview. Thus, in at least 20 out of 30 cases, the date of Mrs. Mitchell's review and signature was different from the date shown on the interview sheet written out by Mrs. Hawkins. BCBC Exh. 22, pp. 1–4, 14–18, 20–30.

92. The March leader interviews were not used unless they related to Beaufort County or surrounding areas at large. Barnacle

Exh. 22, p. 4; Tr. 1106. The March draft of Barnacle's application was amended to reflect the change to Port Royal and to reflect additional interviews and the needs and interests which were ascertained in Port Royal. However, it did not occur to Mrs. Mitchell in April, or when she signed Barnacle's application for Port Royal in May, to check to make sure that statements in the ascertainment portion concerning the conduct of interviews reflected that, while she had conducted the overall effort, Mrs. Wilson had done the leader interviews in April. Tr. 1069. She did not realize that this was important and so she did not think to do so. She did not intend to mislead the Commission or anyone. Tr. 1037. Barnacle Exh. 22, p. 4.

93. The first time Mrs. Mitchell realized that Barnacle's application as originally filed could be read to indicate that all leader interviews were actually done by the Harrisons, or by herself personally, was in the latter part of February when she learned of BCBC's first motion to enlarge issues. Tr. 1074–75.

94. As soon as Mrs. Mitchell became aware of this, Barnacle amended its application on March 20, 1981, over Mrs. Mitchell's signature, to explain in detail who had performed Barnacle's interviews, when and under whose direction. Among other things, it was stated in that amendment that in April of 1980 Mrs. Wilson performed 16 interviews of community leaders. Barnacle Exh. 23, p. 9.

95. Mr. Harrison was aware that Mrs. Wilson had helped with the January 1980 Beaufort general public survey (Tr. 795), but he was not aware that others had helped Mrs. Mitchell with the April 1980 Port Royal public interviews (Tr. 795, 1036), or that anyone other than Mrs. Mitchell had done leader interviews (Tr. 804), until after BCBC had filed its first motion to enlarge issues in February of 1981. Tr. 796. He had in fact been under the impression that Mrs. Mitchell had done the interviews. Tr. 740, 805.

96. Mr. Harrison did in late April, in response to his request of two months before relating to the January general public survey done by Mrs. Wilson, receive from Mrs. Mitchell receipts signed by Mrs. Wilson totaling $85. The receipts show that they were for interviews done in January and April 1980, but Mr. Harrison did not at the time focus on the differences of language (*i.e.*, telephone interviews and personal interviews) (Tr. 722–21), or on the times when the interviewing in question had been done. Tr. 804. The Wilson receipts were sent to him by Mrs. Mitchell in April of 1980 as a result of his insistence back in February on knowing the amount of Mrs. Mitchell's out-of-pocket expenditures for the general public survey done by Mrs. Wilson, because he was anxious to reimburse her (Tr. 720, 804) in accordance with his promise to bear all such expenses. BCBC Exh. 16, p. 1. When he received the receipts, he simply added up the dollar figures shown and sent Mrs. Mitchell a check for the sum. Tr. 721.

*The Misrepresentation/Abuse of Process/Lack of Candor Issues Concerning BCBC (Issues 5 and 6)*

97. On February 17, 1981, BCBC filed a motion to enlarge issues against Barnacle. BCBC requested an issue to determine whether Barnacle's application contained misrepresentations of fact concerning its efforts to ascertain the needs and problems of Port Royal and surrounding areas. In support of its request, BCBC noted that Barnacle's application stated that its community leader interviews were conducted by three of its principals, Frieda R. Mitchell, Ann M. Harrison and Pegram Harrison. However, BCBC claimed that 8 of the 29 leaders listed in Barnacle's application were not in fact contacted by any of these principals. BCBC supplied the affidavits of the eight leaders in question. Three of these leaders, Catherine Vaughn, Charlotte Green and Jack Queener, stated that they were not contacted by anyone concerning a proposed radio station in Port Royal. The remaining five leaders each stated that he or she was contacted by a young black female between 23 and 28 years of age. BCBC claimed that this description eliminated the possibility that any of these five leaders was contacted by the Barnacle principals named above. Barnacle Exh. 12.

98. Catherine Vaughn's affidavit (Barnacle Exh. 12, p. 12) read as follows:

> I am Mrs. Catherine Vaughn. I am the owner of the Vaughn Beauty Salon in Port Royal. I do not remember anyone interviewing me about a radio station. I know Frieda Mitchell, and she has not talked to me about a radio station. I do not remember giving anyone my views about establishing a radio station in Beaufort.

Mrs. Vaughn's affidavit contained the following jurat:

> SWORN to before me this *10* day of February, 1981.
>
> James G. Thomas [signed]
> Notary Public for South Carolina
>
> My Commission Expires: 4–11–89.

99. Charlotte Green's affidavit, dated February 10, 1981 (Barnacle Exh. 12, p. 19), read as follows:

> I am the Director of the Beaufort County Council on Aging. I have not discussed with Frieda Mitchell about a FM radio station in Port Royal. However, I do know her. To the best of my knowledge, I have never been interviewed by anyone about a radio station in Port Royal. I do recall being interviewed by a white man for a Beaufort radio station approximately two years ago.

100. Jack Queener's affidavit, dated February 11, 1981 (Barnacle Exh. 12, p. 18), read as follows:

> I was formerly with the Clemson Extension Service in Beaufort County, S.C. I now work in that capacity in Pickens County, S.C. In regard to the community leader survey for the proposed FM radio station for Port Royal, S.C., I was never interviewed by Frieda Mitchell, and I know her personally. To the best of my knowledge, I was never interviewed by anyone representing the proposed station

in Port Royal. I have worked in radio in the past and actually helped with ascertainment work.

101. On March 12, 1981, Barnacle filed a motion to enlarge issues[9] against BCBC requesting the addition of misrepresentation/abuse of process/ lack of candor issues. Barnacle's motion was based upon BCBC's February 17, 1981 motion, discussed above. In support, Barnacle provided more recent affidavits from Mrs. Vaughn, Mrs. Green and Mr. Queener. Barnacle contended that these more recent affidavits established that Mrs. Vaughn, Mrs. Green and Mr. Queener had been contacted by Barnacle and that BCBC knew of that fact at the time it submitted the original affidavits in support of its motion to enlarge. Barnacle also alleged that Mrs. Vaughn's original affidavit contained a false jurat.

102. Mrs. Vaughn's more recent affidavit, dated February 26, 1981 (Barnacle Exh. 11, p. 1), read as follows:

> I, Mrs. Catherine Vaughn, recalled talking with Mrs. Sally Wilson early last year concerning community interest and a radio station in the Beaufort area.
>
> In February of this year I signed a prepared statement which was brought to me by Mr. Fred Washington Sr. Mr. Washington's visit was during my lunch hour at the kindergarten. I read the statement hurriedly. When I signed the statement I thought it was referring to Mrs. Frieda Mitchell and my conversation only. When I hurriedly read the statement, I did not realize that the words *any one* were included, because I thought the statement referrd [sic] to a conversation between me and Mrs. Mitchell.
>
> Mr. James G. Thomas was not present when I signed the statement.
>
> A copy of the statement referred to in this affidavit is attached.

103. Mrs. Green's more recent affidavit, dated February 26, 1981 (Barnacle Exh. 15, p. 1), read as follows:

> I am the same Charlotte Green who signed the attached affidavit of 10 Feb. 1981.
>
> Ann Harrison came to my house on the evening of Feb. 25, 1981 and I recognized her as the person who interviewed me on behalf of a radio applicant early in January of last year.
>
> Mr. Thomas, who took my attached statement of 10 Feb. 1981, asked me if I had been interviewed by Frieda Mitchell. I told him I had been interviewed by someone but it was not Frieda Mitchell.

104. Mr. Queener's more recent affidavit, dated March 10, 1981 (Barnacle Exh. 18, p. 1), read as follows:

> I am the same Jack Queener who signed the February 1981 affidavit, a copy of which is attached.
>
> At the time I signed the attached affidavit, I recalled, and I now recall, being interviewed about a broadcast station by a young black woman; but I did not

[9] Barnacle's March 12, 1981 motion to enlarge issues against BCBC is officially noticed.

then, and do not now, recall the young woman's name, or on whose behalf she interviewed me. I so informed the person who telephoned me requesting the attached affidavit. This person and I agreed that since my recollection of the interview was vague and uncertain, it would serve no purpose to mention it in the affidavit.

I later received the attached affidavit written out in another person's handwriting based on the conversation just referred to. I signed it in the presence of a notary and returned it to the person who had sent it to me.

105. By *Memorandum Opinion and Order* FCC 81M-1526, released May 14, 1981,[10] Barnacle's March 12, 1981 motion to enlarge issues was granted, and issues were added to this proceeding to determine whether BCBC made misrepresentations to, abused the processes of, or was lacking in candor with the Commission with respect to the submission of the original affidavits of Mrs. Vaughn, Mrs. Green and Mr. Queener.

106. On February 9, 1981, a meeting was held in the offices of James G. Thomas in Beaufort, South Carolina. The purpose of the meeting was to investigate the ascertainment survey done by Barnacle. Present at this meeting were Mr. Thomas, Carmen D. Trevitt and Fred Washington, Sr. Tr. 283–84, 290, 392–94. Messrs. Trevitt and Washington are two of the three partners of BCBC. BCBC Exh. 9, p. 1. Mr. Thomas is an attorney and has practiced law in Beaufort for more than 40 years. Mr. Thomas is also licensed as a notary public by the State of South Carolina and has been so licensed for more than 40 years. Mr. Thomas was retained by Mr. Trevitt to assist BCBC in this investigation, and Mr. Thomas worked closely with Mr. Trevitt and Mr. Washington during the course of this investigation. BCBC Exh. 5, 6, 8; Tr. 317.

107. During the February 9, 1981 meeting, Mr. Washington telephoned Catherine Vaughn. Mrs. Vaughn had been listed in the Barnacle application as having been contacted by a Barnacle principal. Mrs. Vaughn and Mr. Washington had known each other for approximately 25–30 years. BCBC Exh. 6, p. 1; Barnacle Exh. 13, p. 3; Tr. 372.

108. According to both Mr. Washington and Mrs. Vaughn, Mr. Washington asked Mrs. Vaughn if she had been contacted by Frieda Mitchell or anyone else concerning a proposed new radio station. Mrs. Vaughn replied that no one had contacted her about a radio station and she did not know anything about the proposal. BCBC Exh. 6, pp. 1–2; Barnacle Exh. 13, pp. 4–5, 10–11; Tr. 283, 291, 293, 351, 354, 366–67, 402–05. According to Mr. Washington, at the close of their conversation, he told Mrs. Vaughn that he would appreciate her giving him an affidavit that she had not been contacted, and said that he would meet with her personally at a later time. BCBC Exh. 6, p. 2. According to Mrs. Vaughn, however, Mr. Washington did not

[10] *Memorandum Opinion and Order* FCC 81M-1526 is officially noticed.

indicate that he would be coming to see her and she did not expect to see him. Barnacle Exh. 13, p. 11.

109. After concluding his telephone conversation with Mrs. Vaughn, Mr. Washington told Mr. Thomas that Mrs. Vaughn had stated that she had not been interviewed by Frieda Mitchell concerning a radio station; that she did not know anything about a proposed radio station; and that, to the best of her knowledge, no one had interviewed her concerning such a proposal. Based upon Mr. Washington's representations, Mr. Thomas prepared a draft affidavit for Mrs. Vaughn. BCBC Exh. 5, p. 2; Exh. 6, p. 2; Tr. 293.

110. On February 10, 1981, Messrs. Washington, Trevitt and Thomas drove in Mr. Trevitt's car to Mrs. Vaughn's "Little People's College," a daycare center and nursery school in Port Royal. BCBC Exh. 5, p. 2; Exh. 6, p. 2; Barnacle Exh. 13, p. 3; Tr. 354, 356, 406. Mr. Trevitt parked the car about 75–100 feet from the building. Mr. Washington got out of the car, taking with him the draft affidavit Mr. Thomas had prepared, and walked to Mrs. Vaughn's place of business. Messrs. Trevitt and Thomas remained in the car. Mr. Washington knocked on the door of Mrs. Vaughn's school and, after a short conversation with the woman who answered, entered the building. BCBC Exh. 5, pp. 2–3; Exh. 6, p. 2; Tr. 293, 300, 407.

111. Mrs. Vaughn was in the process of serving lunch to her 15–20 students. Barnacle Exh. 13, pp. 5, 12. According to Mrs. Vaughn, her students were "terrible" that day. They had just had a birthday party and it was "too hectic." Barnacle Exh. 13, p. 17. Mr. Washington stated that the children were "finiging around" and Mrs. Vaughn was trying to quiet them down. Tr. 357. Mr. Washington asked Mrs. Vaughn if she had been contacted by Mrs. Mitchell or anyone else concerning a proposed radio station in Port Royal, and Mrs. Vaughn stated that she had not been contacted. Mr. Washington handed Mrs. Vaughn the draft affidavit which had been prepared by Mr. Thomas and asked her to read and sign it. BCBC Exh. 6, p. 2; Barnacle Exh. 13, pp. 5, 12; Tr. 355, 357–58, 367–68. According to Mrs. Vaughn, she read the affidavit "hurriedly" (Barnacle Exh. 13, pp. 5, 12) and then signed it. Barnacle Exh. 13, pp. 5, 12; Tr. 356–58, 367. Mrs. Vaughn made no comments to Mr. Washington after having read or after having signed the document. BCBC Exh. 6, p. 2.

112. After Mrs. Vaughn had signed the affidavit, she accompanied Mr. Washington outside the door of the building. Mrs. Vaughn and Mr. Washington conversed for several moments on the steps of the building. Both Mr. Thomas and Mr. Trevitt observed them from the car. BCBC Exh. 5, p. 3; Exh. 6, pp. 2–3; Tr. 325, 358, 407. At the end of the conversation, Mr. Washington returned to the car. As Mr. Washington approached, Mr. Thomas got out of the car and asked Mr. Washington if the woman to whom he had been talking on the steps was Mrs. Vaughn and if she had signed the affidavit Mr.

Thomas had prepared. Mr. Washington answered yes to both questions and handed Mr. Thomas the signed affidavit. BCBC Exh. 5, p. 3; Exh. 6, p. 3; Tr. 293–94, 300, 324–25, 358–60, 407–09, 412. Mr. Thomas notarized the affidavit on the hood of Mr. Trevitt's car. Tr. 294, 325.

113. According to Mr. Thomas, he and Mr. Washington had an arrangement whereby Mr. Washington would call Mr. Thomas into the building to notarize Mrs. Vaughn's statement after she read and approved it. Tr. 324–25. Indeed, when Mr. Washington returned to the car with the signed statement, Mr. Thomas suggested that he should have gone into the building with Mr. Washington. Tr. 360–61. However, when Mr. Washington told Mr. Thomas that Mrs. Vaughn had already signed the affidavit, Mr. Thomas thought it would have been "ridiculous" for him to have gone into the building, asked Mrs. Vaughn if she was in fact Mrs. Vaughn and if she in fact signed the document. Tr. 324–25. In addition, Mr. Thomas has been acquainted with Mr. Washington for many years and knew him to be "an honest man with a good reputation for honesty in the community." BCBC Exh. 5, p. 3. Having seen the person identified to him by Mr. Washington as Mrs. Vaughn, and having heard Mr. Washington state that Mrs. Vaughn had signed the affidavit, Mr. Thomas considered these facts satisfactory evidence under South Carolina law that Mrs. Vaughn was the person acknowledging and executing the affidavit. Further, Mr. Thomas did not have any concern that the affidavit was false or that it had not been signed by Mrs. Vaughn, and he did not indicate to either Mr. Trevitt or Mr. Washington that the affidavit was faulty in any manner. BCBC Exh. 5, pp. 3–4.

114. Before the submission to the Commission of Mrs. Vaughn's affidavit, Mr. Trevitt had had no discussion with anyone concerning its validity. Nor did he have any reason to believe that the affidavit was not notarized in accordance with South Carolina law. Although from Mr. Trevitt's previous experience in Georgia it was usually the practice to sign affidavits in the presence of a notary, Mr. Trevitt had no knowledge of how that matter was handled in South Carolina. Mr. Trevitt stated that he hired Mr. Thomas for the purpose of handling the affidavits, and he felt it would have been presumptuous of him to have told Mr. Thomas how to handle the legal work he was retained to do. Tr. 434–36.

115. Sometime subsequent to the filing of BCBC's February 17, 1981 motion to enlarge issues, Mrs. Vaughn was contacted by Sally Wilson with respect to Mrs. Vaughn's original affidavit. Barnacle Exh. 13, p. 8. Mrs. Wilson was Frieda Mitchell's executive secretary, functioning as her office manager and administrative assistant. Mrs. Wilson had interviewed Mrs. Vaughn as a part of Barnacle's ascertainment efforts. Barnacle Exh. 10, pp. 2–3; Exh. 22, pp. 2–3; Tr. 885, 947–48. During the course of this visit, Mrs. Wilson brought to Mrs. Vaughn's attention the fact that they had previously spoken.

Mrs. Vaughn then remembered that fact. According to Mrs. Vaughn, at the time she spoke to Mr. Washington and signed her original affidavit, she had forgotten about her earlier conversation with Mrs. Wilson and was not aware of that conversation until reminded of it by Mrs. Wilson. Mrs. Vaughn handwrote her new affidavit and gave it to Mrs. Wilson. Later Mrs. Vaughn signed a typewritten copy of her new affidavit. Barnacle Exh. 13, pp. 7–9, 14.

116. At the February 9, 1981 meeting mentioned above, Mr. Thomas telephoned Charlotte Green, whom he had known for at least 20 years. Mr. Thomas asked Mrs. Green if she had been contacted by Frieda Mitchell or anyone else about a radio station in Port Royal. BCBC Exh. 5, pp. 4–5; Barnacle Exh. 14, p. 6; Tr. 289.

117. Prior to the time of this telephone call, Mrs. Green had spoken to a man and about a month later to a woman about a radio station. Barnacle Exh. 14, p. 9. Mrs. Green associated the woman with the man, that is, Mrs. Green believed that they were with the same organization. Barnacle Exh. 14, pp. 6, 8, 27–28. Mrs. Green was under this impression when she was contacted by Mr. Thomas. Barnacle Exh. 14, p. 29.

118. According to Mr. Thomas, Mrs. Green stated in response to his question that she had not been contacted by Mrs. Mitchell, whom she knew. Mrs. Green did state, however, that she had been contacted by "someone" concerning a Beaufort radio station. BCBC Exh. 5, p. 5; Tr. 284.

119. According to Mrs. Green, she responded to Mr. Thomas' question by stating that she had not been contacted by Mrs. Mitchell. She told Mr. Thomas that she had been contacted by a man whose name she did not remember; that a lady also contacted her; that they were talking about the same radio station; and that the lady was with the man. Mrs. Green stated that she described the man to Mr. Thomas. Barnacle Exh. 14, pp. 6–9, 27.

120. After the conversation ended, Mr. Thomas told Mr. Trevitt that Mrs. Green recalled being contacted by someone concerning a Beaufort radio station. Mr. Trevitt checked the BCBC application and discovered that Mrs. Green had been interviewed in BCBC's ascertainment survey by Calvin R. Means, a BCBC partner. Mr. Thomas had never seen Mr. Means, and Mr. Trevitt described him to Mr. Thomas as "a large white man." On February 10, 1981, Mr. Thomas called Mrs. Green again and asked if the "someone" she recalled as having interviewed her was a large white man. Mrs. Green answered in the affirmative. Based upon these telephone conversations, Mr. Thomas prepared a draft of Mrs. Green's original affidavit. BCBC Exh. 5, p. 5; Exh. 9, p. 1; Tr. 285–87, 318–19, 396–400.

121. On February 10, 1981, Mr. Thomas visited Mrs. Green and presented her with the draft affidavit he had prepared. Mrs. Green read the affidavit and signed it without indicating any disagreement with its contents. Mr. Thomas notarized the affidavit and gave it to

Mr. Trevitt. BCBC Exh. 5, p. 5; Barnacle Exh. 14, pp. 9–10; Tr. 289–90.

122. On the evening of February 25, 1981, subsequent to the filing of BCBC's motion to enlarge issues, Barnacle principal Ann M. Harrison and Barnacle attorney Frank J. Martin, Jr. visited Mrs. Green at her residence. Barnacle Exh. 16, p. 1. Mrs. Green was making her supper at the time they arrived and was "perturbed," but agreed to talk with them. Barnacle Exh. 14, p. 17. According to Mrs. Harrison, Mrs. Green recognized her as the person who interviewed her in early January 1980 on behalf of a radio applicant. Mrs. Green stated that Mr. Thomas had asked her if she had been interviewed by Frieda Mitchell; that she had told Mr. Thomas that she had been interviewed by two people, one woman and one man; but that the person who interviewed her was not Mrs. Mitchell and did not mention Mrs. Mitchell. Barnacle Exh. 16, p. 1.

123. Later that evening, Mrs. Harrison returned to Mrs. Green's residence with a draft affidavit based upon what Mrs. Green had stated earlier. Accompanying Mrs. Harrison was Mary A. Gray, a notary public and the auditor of Beaufort County. According to Mrs. Harrison, Mrs. Green read the statement and noticed that the name at the bottom was wrong. Mrs. Harrison changed this, Mrs. Green signed the statement, and Mrs. Gray notarized it. Mrs. Gray stated that a notarial seal should be affixed since the affidavit was to be used out of state and suggested that the affidavit be brought to her office at the courthouse the next morning so that she could affix her seal. Barnacle Exh. 16, pp. 1–2; Exh. 14, pp. 13–15, 18–19; Tr. 303.

124. The affidavit that Mrs. Green signed the evening of February 25, 1981 (Barnacle Exh. 17, p. 2) read as follows:

> I am the same Charlotte L. Green who signed the attached affidavit of 10 Feb. 1981.
>
> Ann Harrison came to my house on the evening of Feb. 25, 1981, and I recognized her as the person who interviewed me on behalf of a radio applicant early in January of last year.
>
> Mr. Thomas, who took my attached statement of 10 Feb. 1981, asked me if I had been interviewed by Frieda Mitchell. I told him I had been interviewed by two people, one of whom was a lady, and the other a man. But I told him that neither of the people who interviewed me was Frieda Mitchell, or mentioned Frieda Mitchell.

125. The next morning Mrs. Green was upset. She "couldn't get all this business out of [her] mind." She went to the courthouse on her way to work and sought out Mrs. Gray. She told Mrs. Gray that she did not "want to put [herself] in jeopardy over any radio stations, any tv stations or anything else." Barnacle Exh. 14, pp. 15–16, 20. At about 8:00–8:30 a.m., Mrs. Gray called Mr. Thomas at home. Barnacle Exh. 14, pp. 20–21; Tr. 303, 320. Mr. Thomas was told that Mrs. Harrison had been to see Mrs. Green and that Mrs. Gray had been asked to notarize a statement. Tr. 321. This was the first time

Mr. Thomas learned that Mrs. Green had been approached by Barnacle with respect to her original affidavit. Tr. 319–20. Mrs. Gray told Mr. Thomas she thought he should know about the matter because Mrs. Gray did not feel comfortable notarizing the statement and Mrs. Green did not feel comfortable about it either. Tr. 321.

126. Although Mr. Thomas was not asked to come to the courthouse, he had to be there on other business and decided to talk to Mrs. Gray about the telephone call. Tr. 322. Mrs. Green was still in Mrs. Gray's office when he arrived and Mr. Thomas was surprised to see her there. Tr. 303, 322. Mrs. Green told Mr. Thomas that a lady had come to see her and asked if she recognized her. According to Mr. Thomas, Mrs. Green stated that she recognized her as "the lady [she] talked to down at the radio station." Tr. 303. Mrs. Green stated to Mr. Thomas that she told him earlier that she had been interviewed by a lady and a man. Mr. Thomas told Mrs. Green that she did not tell him about any woman, just about one white man. According to Mr. Thomas, Mrs. Green stated that she thought she had told him about two people. Tr. 304, 322, 325–26.

127. Mrs. Green had with her a copy of her February 25, 1981 affidavit and showed it to Mr. Thomas. Tr. 304, 313, 322. Mr. Thomas objected to the last two sentences of that affidavit and with Mrs. Green's consent made changes in those sentences. Tr. 306, 313–14, 323. Subsequently, Barnacle principal Pegram Harrison arrived at the courthouse for the purpose of having Mrs. Gray affix her notarial seal to Mrs. Green's February 25 affidavit. Mr. Harrison had the original of that affidavit in his possession. Mr. Harrison found Mr. Thomas and Mrs. Green with Mrs. Gray, and called Barnacle's attorney who joined them at the courthouse. Barnacle Exh. 17, p. 1; Tr. 780–81, 785–86.

128. According to Mr. Harrison, after he arrived Mrs. Green said that she did not want to give Barnacle her February 25 affidavit anymore. Mr. Harrison stated that it was "vital" to Barnacle to show that Mrs. Harrison had, in fact, interviewed Mrs. Green. Mrs. Green was willing to state that, and an agreement was reached whereby Barnacle would "give up" Mrs. Green's February 25 affidavit in exchange for another one. Tr. 786.

129. The changes that Mr. Thomas had made in Mrs. Green's February 25 affidavit were not acceptable to Mr. Martin, Barnacle's attorney. Messrs. Thomas and Martin re-wrote the sentences in question in a form that was acceptable to both of them. The affidavit was retyped, Mrs. Green signed it and it was notarized by Mrs. Gray. Barnacle Exh. 15, p. 1; Tr. 308, 310. This affidavit, the one Mrs. Green executed in the courthouse, was Mrs. Green's February 26 affidavit. Tr. 310.

130. According to Mrs. Green, Mrs. Harrison was also present at the courthouse on February 26, 1981. Barnacle Exh. 14, pp. 16, 20–22. Mrs. Green stated that as soon as she saw Mrs. Harrison at the

courthouse, she realized that Mrs. Harrison was not associated with the man to whom she had spoken about a radio station, and that she had been mistakenly associating the two with each other. Barnacle Exh. 14, pp. 22, 28.

131. According to Mr. Thomas, until the February 26, 1981 meeting in the courthouse, he never knew that Mrs. Green had spoken to two people about a radio station. Tr. 314. Mr. Thomas stated that Mrs. Green did not mention having been interviewed by anyone other than the man he described to her, *i.e.*, Mr. Means. Tr. 289. Had Mrs. Green told him that she had been interviewed by both a man and a woman, he would not have attempted to obtain her original affidavit. Tr. 314, 325–26.

132. As part of the investigation into Barnacle's ascertainment efforts, BCBC partner Carmen Trevitt telephoned Jack Queener from Beaufort on February 10, 1981 and visited Mr. Queener's office in Pickens, South Carolina on February 11, 1981. BCBC Exh. 8, p. 2; Tr. 392, 412–13, 417.

133. During the course of either the telephone conversation, the visit or both, Mr. Trevitt identified himself and his affiliation with BCBC and mentioned the competing application of Barnacle and the names of the Barnacle principals. Mr. Trevitt stated that he thought Barnacle had not followed the Commission's application procedure as strictly as it should have been followed in that Barnacle had presented "ascertainments" performed by non-principals. Mr. Trevitt asked if he could clarify certain matters with Mr. Queener. Barnacle Exh. 19, pp. 14–15, 29, 43–45; Tr. 421.

134. Mr. Trevitt asked Mr. Queener if he had been interviewed by anyone concerning a proposal to establish a new radio station in Port Royal and whether Frieda Mitchell had personally interviewed him in Barnacle's ascertainment survey. Mr. Queener responded in the negative. BCBC Exh. 8, pp. 2–3; Barnacle Exh. 19, pp. 15–16; Tr. 413–15, 421–22, 427. Mr. Trevitt indicated that other people had signed affidavits stating that they had not been personally interviewed by Mrs. Mitchell, or that they had been contacted by a young black woman. Barnacle Exh. 19, pp. 17, 24, 40, 42; BCBC Exh. 8, p. 3.[11] Mr. Trevitt and Mr. Queener discussed the possibility that Mr. Queener might have been contacted by a young black woman. BCBC Exh. 8, p. 3; Barnacle Exh. 19, pp. 17, 40, 42. Mr. Queener recalled such a contact, but only after having his recollection refreshed by Mr. Trevitt. Barnacle Exh. 19, pp. 18, 40, 42; Tr. 422, 424, 427, 446.

[11] According to Mr. Trevitt, he showed these affidavits to Mr. Queener in his office in Pickens, Queener read them and they discussed them. BCBC Exh. 8, p. 3; Tr. 420–22, 424, 427, 452–54, 456. According to Mr. Queener, these affidavits were discussed over the telephone and he did not recall seeing, reading or discussing them in his office. Barnacle Exh. 19, pp. 17, 24–25, 41–42.

However, Mr. Queener thought that this woman was a CETA worker doing ascertainment work for an educational television station,[12] did not connect this contact to Barnacle, and so informed Mr. Trevitt. Barnacle Exh. 19, pp. 18, 30, 40, 42, 44. Since Mr. Queener's recollection of his contact with this young black woman was so vague, Mr. Queener and Mr. Trevitt decided not to mention it in Mr. Queener's original affidavit. BCBC Exh. 8, p. 3; Barnacle Exh. 18, p. 1; Tr. 422, 446.

135. Mr. Trevitt partially constructed a draft of Mr. Queener's original affidavit while waiting for Mr. Queener at his office in Pickens. Tr. 418. Mr. Trevitt completed the draft after the discussion. BCBC Exh. 8, p. 5. Mr. Queener read the draft thoroughly and, except for the name of the county in the hearing, made no modifications thereto. Barnacle Exh. 19, p. 22; Tr. 447. Mr. Queener then executed the affidavit before a notary public. BCBC Exh. 8, p. 5; Barnacle Exh. 19, pp. 26–29.

136. According to Mr. Trevitt, had Mr. Queener mentioned with any degree of certainty that he recalled being contacted by a young black woman, he would have been "more than willing" to put it in the original affidavit. Likewise, Mr. Trevitt would have been "delighted" to include this contact had Mr. Queener made "even a slight suggestion" that it be included. BCBC Exh. 8, pp. 3–4; Tr. 422, 426, 446. Mr. Trevitt had been advised by BCBC's Washington communications counsel that if anyone other than the Barnacle principals had made contacts with community leaders, then Barnacle had "materially misrepresented" its ascertainment efforts to the Commission. Therefore, according to Mr. Trevitt, it made no difference to him whether Mr. Queener had been contacted by a young black woman or whether he had not been contacted at all, as long as he was not contacted by a Barnacle principal. BCBC Exh. 8, p. 4; Tr. 404, 427, 429.

137. Mr. Queener stated that the inclusion in his original affidavit of this contact with the young black woman was not "essential" to him "since [his] recollection was vague and [he] did not know who the young lady was." Barnacle Exh. 19, p. 42. Mr. Queener further stated that he did not connect this young black woman "in [his] mind . . . with this set of applications and set of interviews, . . . and, to [him], including her as a possibility would merely [have been] a matter of muddying the water," and would have been "misleading." Barnacle Exh. 19, p. 44. Mr. Queener also stated that "as long as [he did not] know that she was connected with this particular application . . . then [he did not] say that it [had] to be in the affidavit; . . . if [he] were convinced in [his] own mind that she was,

[12] In his job with the Clemson University Extension Service in Beaufort County, Mr. Queener was interviewed several times per year in ascertainment surveys. Barnacle Exh. 19, p. 5; BCBC Exh. 8, p. 3; Tr. 422.

then [he] . . . would have placed it in the initial affidavit." Barnacle Exh. 19, p. 30.

138. Moreover, Mr. Queener stated that the portion of his original affidavit which declared that he "was never interviewed by anyone representing the proposed station in Port Royal" reflected his memory and was to the best of his knowledge and belief at the time. Barnacle Exh. 19, p. 43. According to Mr. Queener, there is no conflict between his original and new affidavit, and his new affidavit did not represent a change in his initial position. Barnacle Exh. 19, pp. 45–46. Finally, Mr. Queener stated that he was still uncertain as to whether the young black woman was connected with Barnacle. Barnacle Exh. 19, pp. 18–19, 37.

*Ultimate Findings and Conclusions*

139. This proceeding involves the mutually-exclusive applications of BCBC and Barnacle. BCBC has designated Beaufort, South Carolina as its specified community, whereas Barnacle has specified Port Royal, South Carolina. In addition to the Section 307(b) and contingent comparative issues, the *Designation Order* and the subsequent orders of the presiding judge specified issues as to whether BCBC had complied with Rule 1.65 regarding the FAA's adverse determination; whether Barnacle had complied with Rules 1.65 and 73.3514 as to its ascertainment; and whether BCBC had made misrepresentations or abused Commission processes or been lacking in candor with respect to the Vaughn, Queener and Green affidavits. Because only basically qualified applicants are entitled to Section 307(b) and comparative consideration,[13] the basic qualifying issues specified against BCBC will first be considered.

*Misrepresentation/Abuse of Process/Lack of Candor Issues*

140. *Catherine Vaughn.* In her original affidavit, Mrs. Vaughn stated that she had not been contacted by Frieda Mitchell or "anyone" else concerning the proposed radio station. She persisted in this belief until she was revisited by Sally Wilson. Upon seeing Mrs. Wilson the second time, Mrs. Vaughn recalled that she was previously interviewed by Sally Wilson. Mrs. Vaughn then executed a second affidavit which reformed the first affidavit. Although the original affidavit misstated the facts, the record does not disclose any intent to deceive on the part of Catherine Vaughn. Nor can any such intent be imputed to BCBC. The affidavit prepared by Mr. Thomas accurately reflected Mrs. Vaughn's stated recollection.

141. The question whether attorney Thomas properly acknowledged Mrs. Vaughn's signature on the original affidavit need not be resolved. BCBC retained Mr. Thomas to help in the investigation of

[13] *Louis Adelman*, 29 FCC 1223 (1960), *aff'd sub nom.* Guinan v. Federal Communications Commission, 297 F.2d 782 (1961).

Barnacle's ascertainment. efforts and to draft affidavits in conjunction with that investigation. BCBC relied on Mr. Thomas' experience and expertise, and there is no evidence that any of the BCBC principals had any knowledge that the Vaughn affidavit was improperly notarized.

142. *Charlotte Green.* Originally, attorney Thomas stated that Charlotte Green informed him that she had been contacted by "someone" who Mrs. Green later confirmed to be a "large white man." Subsequently, during her deposition testimony, Mrs. Green stated that she informed Mr. Thomas that she had been contacted by two persons, a man and a woman, about the proposed radio station.

143. As noted by the Bureau, this conflict in testimony cannot be resolved. Mrs. Green was too ill to attend the hearing. Because of her involuntary absence, her deposition was received into evidence. Mr. Thomas did appear at the hearing and appeared to be a credible witness. Inasmuch as the presiding judge did not have the opportunity to observe Mrs. Green testifying, sufficient weight cannot be given to Mrs. Green's deposition as to offset Mr. Thomas' testimony and support the charge of misrepresentation. Moreover, the findings also establish that Mrs. Green read the draft of her original affidavit before she signed it and that she signed it voluntarily.

144. *Jack Queener.* Jack Queener's original affidavit stated that he had never been interviewed by Frieda Mitchell or anyone else concerning a proposed station in Port Royal. Mr. Queener's new affidavit stated that at the time he signed the original affidavit, he recalled being interviewed by a young black woman and he so informed the person who obtained his original affidavit, *i.e.*, BCBC principal Carmen Trevitt. It was alleged that BCBC withheld from the Commission the fact that Mr. Queener had been interviewed by a young black woman.

145. The record establishes, and it is concluded, that BCBC did not withhold information from the Commission. Mr. Queener's recollection of the contact with the young black woman was so vague that Mr. Queener and Mr. Trevitt decided not to include it in the original affidavit. Thus, Mr. Queener did not know who the woman was, did not connect her with the Barnacle/BCBC applications, and did not know on whose behalf she interviewed him. Mr. Queener thought she was a CETA worker doing ascertainment work for an educational television station. Further, Mr. Queener stated that he is still uncertain as to whether the woman was connected with Barnacle. Moreover, Mr. Queener stated that to have included this contact in his original affidavit would have been a matter of "muddying the water" and would have been "misleading."

146. In addition, the record establishes that Messrs. Queener and Trevitt discussed the draft of his original affidavit, Mr. Queener read the draft thoroughly before signing it, made a change in the heading

of the draft and signed it voluntarily. Finally, Mr. Queener's original affidavit represented his best recollection at the time it was signed.

147. In view of all these circumstances, it cannot be concluded that BCBC misrepresented facts to, abused the processes of or lacked candor with the Commission with respect to the submission of Mr. Queener's original affidavit.

148. Although no qualifying issues have been specified against Barnacle,[14] BCBC argues that the record discloses a number of discrepancies of decisional significance which question the veracity of Mrs. Mitchell's testimony and Barnacle's candor with the Commission in its opposition to BCBC's motion to enlarge issues.

149. Specifically, BCBC charges in its proposed conclusions that Mrs. Mitchell testified "falsely" throughout this proceeding when she maintained that she "forgot" the requirement that principals conduct community leader interviews. BCBC bases its conclusion on the fact that Mrs. Mitchell was provided with a copy of the *Primer* and a detailed memorandum; that subsequently she had conversations with principal Harrison when these requirements were discussed; that the interview sheets Mrs. Mitchell used were fail proof; that Mrs. Mitchell remembered the requirements when she instructed Mrs. Wilson to conduct telephone interviews with the general public; and that Mrs. Mitchell entered misleading dates on the questionnaires describing the Wilson interviews.

150. BCBC's allegations are unmeritorious because they are based on sheer speculation. Mrs. Mitchell's testimony is credible and is given full weight. There is no evidence that indicates that she in fact did not forget the requirement that principals conduct community leader interviews. There is no evidence that Mrs. Mitchell dated the interview sheets in an effort to mislead anyone. As a matter of fact, Mrs. Mitchell dated her signature after the date shown on the interview sheets. BCBC Exh. 21, pp. 6–11, 18.

151. BCBC also argues that Barnacle's actions in this proceeding evince a lack of candor with the Commission in at least three instances, all related to its opposition pleading to BCBC's motion to enlarge issues.

152. First, BCBC states that Barnacle lacked candor in not admitting to certain allegations made by BCBC in its motion to enlarge issues regarding Barnacle's ascertainment efforts. This is demonstrated, BCBC avers, by Barnacle's principals admitting these same allegations at hearing. It appears, however, and it is so ruled, that Barnacle's response to BCBC's motion constitutes a legal argument and does not contradict the testimony presented by Barnacle's principals at hearing.

153. Secondly, BCBC argues that Barnacle represented to the Commission in its opposition to BCBC's motion to enlarge issues that

[14] Issue 4 was specified only on a comparative basis.

it had completed a full ascertainment effort for the Beaufort draft prepared in March of 1980 and that when a decision was made to apply for a station at Port Royal, additional interviews, using different procedures, were taken; and the subsequent misrepresentation (that all interviews were done by principals) resulted from an inadvertent failure to correct the Beaufort draft to reflect the actual procedures utilized in the survey. According to BCBC, the fact is that Barnacle's draft was changed before it was filed and it was changed so that the application would conform with the requirements of the *Primer*.

154. BCBC's charge doesn't wash. There is no contradiction between Barnacle's assertion that the misrepresentation resulted from the inadvertent failure to correct its Beaufort draft in one regard and the fact that it did correct the draft in other regards. Nor is any intent to mislead the Commission apparent on the face of the facts alleged.

155. Finally, BCBC argues that Mrs. Mitchell's amendment of prefiled testimony at the hearing resulted in a material revision of the factual basis for Barnacle's defense in the aforementioned opposition filing. In the affidavit attached to the opposition, Mrs. Mitchell stated that her secretary, Mrs. Wilson, did not participate in the ascertainment survey until after the decision to file for Port Royal was made. BCBC asserts that the record reflects that she did interviews before the decision to file for Port Royal was made and that this change is significant because Barnacle's reliance on Mrs. Mitchell's "inaccurate excuses" persuaded the former presiding judge that the intentional misrepresentation issue requested by BCBC should not be added. BCBC adds that the cause of the misrepresentation was that Mrs. Mitchell signed her name as interviewer on each of the interview sheets and that Barnacle was aware in February of 1981 that Mrs. Mitchell signed her name as interviewer on sheets describing interviews done by Mrs. Wilson. Thus, BCBC concludes that Barnacle chose to present the former presiding judge with a version of facts it knew or should have known to be misleading.

156. This complaint, too, fails. The motion to enlarge issues charged that someone other than Barnacle's principals had apparently interviewed several of the leaders listed in the application. In its response, Barnacle candidly admitted that Mrs. Wilson had conducted leader interviews and gave considerable detail about who conducted all interviews and when. Barnacle further stated that Mrs. Mitchell did not realize the importance of stating in the application just who actually did the interviews and that this was why she did not check to see that the exhibit, which had been drafted before Mrs. Wilson's interviews were done, was changed to reflect that Mrs. Wilson had interviewed some leaders in April of 1980. It was this admission that was the basis for specifying issue 4 on a

comparative basis. There is nothing misleading about Barnacle's opposition filing.

157. It is concluded that there is no substance to BCBC's allegations that Barnacle misrepresented facts or lacked candor with the Commission.

*Section 307(b) Issue*

158. BCBC and Barnacle have been found basically qualified, and it is now necessary to consider the proposals under Section 307(b) of the Communications Act of 1934, as amended. This section requires that the Commission "shall make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same." In resolving a Section 307(b) issue, the Commission looks to both the needs of the communities involved for a transmission service and the needs of the populations to be served for a reception service. *Congaree Broadcasters, Inc.*, 42 FCC 2d 683 (Rev. Bd. 1973); *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640 (Rev. Bd. 1973). In *FM Broadcast Rules*, 40 FCC 662, 664 (1962), the Commission listed three objectives to be applied in making 307(b) FM determinations in the following order of importance: (1) provision of some service to all of the nation, or as much as possible; (2) provision of as many program choices to as many listeners as possible; and (3) service of local origin to as many communities as possible. *See WHW Enterprises, Inc.*, 89 FCC 2d 799 (Rev. Bd. 1982).

159. The first two of these objectives deal with so-called reception aspects of mutually-exclusive proposals, *i.e.*, they deal with whether people to be served by one or more proposals, but not by the other or others, have a need for a first or additional reception service. *See Resort Broadcasting Co., Inc., supra.* In the instant case, it is concluded that neither applicant can be awarded a preference under the first and second objectives. The city of Beaufort and the town of Port Royal presently have available identical primary aural broadcast services. Consequently, neither BCBC nor Barnacle has a reception service advantage over the other, and neither community has a greater reception service need than does the other. However, under the third objective, *i.e.*, service of local origin to as many communities as possible, it is clear that the proposal for Port Royal must be preferred over the proposal for Beaufort. The findings establish that the town of Port Royal is a municipality organized under the laws of the State of South Carolina. It had a 1980 population of 2,977, an increase of 3.9% over its 1970 population. The town operates under the "council-manager" form of government, and has an acting town manager, a mayor and a city council. The town has its own code of ordinances, provides its own police and fire protection, has its own municipal court and levies its own taxes.

The town has a business district, houses of worship of various denominations, and civic organizations. Port Royal has no local broadcast transmission service of any kind, and a grant of Barnacle's application would result in the provision of a first local transmission service to Port Royal. On the other hand, a grant of the BCBC application will bring a fourth commercial station to the city of Beaufort, while Port Royal would remain without a local station. This is dispositive and requires that Barnacle be given a decisional preference under Section 307(b) of the Act. In *Pasadena Broadcasting Co. v. F.C.C.*, 555 F.2d 1046, 1050–51 (D.C. Cir. 1977), the Court of Appeals stated as follows:

> Local transmission service bestows such important benefits that we have consistently interpreted Section 307(b) virtually to ensure an applicant for first local service preference over one who proposes merely to complement preexisting local operations. [Footnotes omitted.]

*See also Robert J. Reverman*, 78 FCC 2d 1110 (Rev. Bd. 1980).

160. BCBC would concede a decided preference to Barnacle's proposal over its own, except that it believes that Commission policies employed in the assignment of high-powered regional facilities militate against the grant of any preference under Section 307(b) to Barnacle because Port Royal is too small a community to have warranted an assignment of a Class C channel in the first place. BCBC cites *WHW*, *supra*, in support, but misconstrues its holding. In *WHW*, the Review Board noted that in assigning channel 299B to Kalamazoo, the Commission also explicitly rejected a contention that Portage should be treated like a suburban community to which a smaller facility is usually assigned. That does not go to say that where, as here, a Class C channel is assigned to a given community, an application for an adjoining community pursuant to Section 73.203(b) of the Rules is inappropriate or that such an applicant, because of its size, may not receive a preference under Section 307(b).

161. The Barnacle application for Port Royal is preferred under the Section 307(b) issue, and this case can be decided under such issue. Thus, while findings have been made under the contingent comparative issue, it is unnecessary to arrive at conclusions under this issue because the Section 307(b) issue is dispositive. The public interest, convenience and necessity will be served by a grant of the Barnacle application for Port Royal.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Barnacle Broadcasting Ltd. for authority to construct and operate a new FM broadcast station on channel 259C at Port Royal, South

Carolina IS GRANTED and the application of Beaufort County Broadcasting Company IS DENIED.[15]

FEDERAL COMMUNICATIONS COMMISSION
JOHN M. FRYSIAK, *Administrative Law Judge*

[15] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Coverage, Misrepresentation
Ratings, Distortion of, See also Hypoing

Commission will no longer maintain policies against the misuse of audience ratings data or the use of inaccurate or exaggerated coverage maps or coverage claims by broadcast licensees. *–Broadcast Regulation*

FCC 83–339

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In the Matter of

Elimination of Unnecessary Broadcast Regulation

POLICY STATEMENT AND ORDER

(Adopted: July 14, 1983; Released: August 2, 1983)

BY THE COMMISSION:

1. This is the first in a series of Policy Statements that we expect to issue over the course of the coming months eliminating or proposing to eliminate various broadcast policies which our review indicates are no longer warranted or required by the public interest. These policies concern activities in which the Commission does not believe it should continue to expend resources, especially, but not solely, where there exist sufficient private remedies or market forces to deter the activity addressed by the particular policy. Additionally, we will be issuing one or more *Notices of Proposed Rule Making* in cases such as where the conduct is the subject of a Commission rule but contains issues closely related to those involved in policies being dealt with in this umbrella proceeding.[1] We turn now to a discussion of the specific policies addressed by this Policy Statement.

[1] As is apparent, our action here is not being taken pursuant to notice and comment procedures. Section 553(b)(3)(A) of the Administrative Procedure Act [5 U.S.C. §553(b)(3)(A)] does not require the issuance of a notice and an opportunity for comment where, *inter alia* "general statements of policy" are involved. Further, the listing of many of the Commission's policies in Section 73.4000 *et seq.* of the Commission's Rules does not affect the need, or lack thereof, for a notice and comment proceeding. Section 73.4000 clearly states that the policies are listed, and that relevant citations are provided in the Rules, "solely for the purpose of reference and convenience. . ."

*Distortion of Ratings*

2. In 1963, as a result of information developed both in hearings before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce and through complaints filed with the Commission, the Commission issued a Public Notice (FCC 63–544) cautioning licensees about the improper use of ratings information. That Public Notice informed licensees that they were obliged to act responsibly in the use of such information and to ensure that survey material utilized in advertising campaigns was valid.[2] However, the Commission indicated that ordinarily it would refer complaints concerning questionable uses of ratings material to the Federal Trade Commission (FTC) for that agency's consideration and would take into account findings or orders to cease and desist entered by the FTC against licensees. Subsequently, the FTC issued guidelines regarding the use of broadcast ratings survey data. Generally, the FTC statement detailed practices that broadcasters should endeavor to avoid. For example, broadcasters were advised that it is improper to quote from an audience survey (or to quote survey data) in such a way as to create a misleading impression of the survey's results. Additionally, broadcasters were advised to refrain from making audience claims based upon data compiled in a survey which the broadcaster knows or has reason to know was not designed, conducted or analyzed in accordance with accepted statistical principles and procedures or where they know the data to be obsolete. In a 1965 Public Notice,[3] the FCC brought these guidelines to the attention of its broadcast licensees and stated that, in determining whether a licensee is operating in the public interest, it would take into consideration a licensee's operation within the FTC guidelines. The Commission also restated its existing policy of generally referring complaints involving the use of broadcast ratings to the FTC and reaffirmed its intention to consider any findings or orders to cease and desist issued against a licensee by that agency. Subsequently, the Commission

---

[2] The policy being considered here involves the *use* of data by licensees (either, for example, the misleading *use* of accurate data or the *use* of data known to be invalid or inaccurate). It is not to be confused with the Commission's policy against licensee participation in deliberate attempts to alter the outcome of a rating survey by engaging in activities that undermine the validity of the sampling process. *Public Notice*, 65 F.C.C. 2d 413 (1977). In the latter policy, which is not at issue here, the conduct addressed is not the *use* of the data, but an effort to artificially affect the data themselves.

[3] *"Commission Calls Attention of Licensees to FTC Statement on Broadcast Ratings,"* 1 F.C.C. 2d 1078 (1965).

commenced a rule making proceeding looking toward the adoption of rules prohibiting ratings misuse practices.[4] Although the Commission determined that the need for such a rule was outweighted by the First Amendment and Section 326 considerations which the rule would raise, it again reiterated its concern with ratings distortion practices.[5]

3. Although the Commission's general policy has been to refer complaints to the FTC, and to take findings and orders to cease and desist issued by that agency into account in assessing a licensee's qualifications to retain its license, it also has independently evaluated complaints regarding the misuse of ratings information by licensees. The Commission has, for example, granted short-term license renewals based upon such conduct even absent any findings by the FTC.[6] As a result, the Commission continues to receive, and consider, numerous complaints of misuse of ratings information in the first instance. Such complaints typically are filed by competitors alleging that the subject station is promoting itself either to the public or to advertisers and advertising agencies by making misleading claims as to the station's popularity.[7]

4. We no longer are persuaded that the Commission's limited resources are well spent by continuing to investigate and adjudicate complaints of this nature in the first instance. These types of claims are made by businesses every day as to their popularity. However, a principal difference between such claims made by broadcasters and those made by non-broadcasters is that in the broadcasting context these claims are made more to obtain advertising than to influence purchasing decisions made by members of the public at large.[8] Yet, given the availability of detailed audience rating data for both radio and television, advertisers and advertising agencies are in a particularly good position to verify the accuracy of ratings claims and to decide for themselves the significance that they will attach to claims made by the stations. Moreover, competing stations learning of a station's misuse of ratings data should be able and would likely be inclined to counteract any impact of such claims by notifying the

---

[4] *Amendment of Part 73 of the Commission's Rules and Regulations to Prohibit Distortion of Audience Ratings (Docket No. 20501)*, 40 Fed. Reg. 26698 (June 25, 1975).

[5] *Report and Order* (Docket No. 20501), 58 F.C.C. 2d 513 (1976). For the application of this policy to a licensee's conduct see, *Coastal Telecommunications Corp.*, 66 F.C.C. 2d 941 (1977).

[6] *KPIK*, 14 F.C.C. 2d 267 (1968); *Marsh Media, Ltd.*, 38 F.C.C. 2d 457 (1972).

[7] Such complaints often allege that a station is informing the public or advertisers that, for example, "W is Central City's number one country music station," whereas the complainant disputes that assertion.

[8] We feel it is unlikely that viewers or listeners would be appreciably influenced in their choice of stations merely because a broadcast station claimed to have superior ratings. Rather, it is more likely that such decisions are based upon the programming fare offered by each station.

advertisers and agencies that they dispute the claims being made. Furthermore, in all business relationships such as those involved in the purchasing of broadcast advertisements, the commercial entities have a strong incentive to deal candidly with each other. In instances where this incentive proves inadequate to deter fraudulent behavior, legal recourse against the offending station by the defrauded party is available.

5. Given these non-regulatory methods of dealing with ratings abuse problems, and the commercial nature of the conduct involved, we believe that continued Commission oversight in this area in the first instance is not warranted. Accordingly, all future complaints in this area should be directed to the FTC. In addition, all pending requests for Commission action involving licensees' alleged misuse of ratings information will be forwarded to the FTC.[9] However, as in other areas where adverse determinations concerning licensee conduct are made, we will continue to consider FTC findings and orders to cease and desist relating to licensee abuse of ratings information in determining whether a licensee is acting in the public interest.[10]

*Coverage Maps and Statements Regarding Stations' Coverage*

6. The Commission's policy concerning misleading coverage claims or the use of inaccurate or exaggerated coverage maps by broadcast licensees was set forth in a letter to Radio Station WARO.[11] In that letter the Commission stated that it expected licensees to deal candidly with the public and with advertisers. It condemned the use of inaccurate and exaggerated coverage maps or any practice intended to deceive or mislead advertisers or the public. Licensees were warned that care should be exercised to assure that advertisers were not misled and that full disclosure of station coverage was essential in exercising this responsibility.

7. We do not condone the use of inaccurate or exaggerated coverage maps or other misleading material regarding a station's coverage in connection with the sale of broadcast air time. The same considerations, however, which led us to conclude that continuing Commission involvement in the area of ratings abuse is no longer warranted, suggest the same conclusion with respect to the use of misleading coverage maps or coverage information by broadcast licensees. Here, as there, a business relationship between a broadcaster and its advertisers is primarily at issue;[12] the same capacity

[9] Complainants in individual cases will be formally notified of this change in policy prior to our forwarding the complaints.

[10] *See Violation of Laws of USA by Station Applicants*, 42 F.C.C. 2d 399 (1951).

[11] *Universal Communications of Pittsburgh, Inc.*, 74 F.C.C. 2d 617 (1969).

[12] Indeed, coverage maps and information are utilized almost exclusively as an aid in selling commercial time to advertisers. There is little, if any, likelihood that

for independent verification by advertisers of a broadcaster's claims exists; and, the same forceful incentive for candid dealing obtains, as does the availability of private legal remedies should this incentive fail to prevent abusive conduct. We note, moreover, that should a licensee file a misleading coverage map with the Commission, the licensee could be found to have misrepresented facts to the Commission, thus placing its license at risk, and possibly to have violated 18 U.S.C. § 1001, thus subjecting itself to criminal penalties. In view of the foregoing, we are changing our policy and, therefore, we no longer plan to investigate or adjudicate complaints involving misleading coverage claims or the use of inaccurate or exaggerated coverage maps by broadcast licensees.[13]

8. In conclusion, therefore, this *Order* implements the following determination by the Commission: (1) that allegations of ratings distortions and misleading coverage claims are more appropriately explored and decided in other forums and will be so directed in the future: and (2) that, notwithstanding this determination, we will continue to consider the effect of adverse findings on the licensee's character qualifications. We have not determined in this *Order* what weight should attach to other outcomes; *e.g.*, a proceeding terminated for failure to prosecute, or by plea of *nolo contendere* or by a consent order. The relevance of these situations to licensee character evaluation, and indeed the more general question of whether the Commission should continue to consider even adverse findings where, as here, the activities are primarily business-related rather than broadcast-related, will be resolved in the pending proceedings in Gen. Docket No. 81–500, Policy Regarding Character Qualifications in Broadcast Licensing, 87 FCC 2d 836, 848 (1981).

9. Accordingly, IT IS ORDERED, That Sections 73.4035 and 73.4090 of the Commission's Rules ARE DELETED as set forth in the attached Appendix, effective September 2, 1983.

10. Authority for this action is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

1. 47 C.F.R., Section 73.4035, Audience ratings: Hypoing and survey misuse, is removed in its entirety.

---

information derived from exaggerated coverage maps or misleading coverage claims would be addressed directly to the listening or viewing public, or in any significant way would be relied upon by them. *See* n. 8, *supra*.

[13] To the extent, of course, that a licensee's use of exaggerated or inaccurate coverage maps or other materials concerning coverage results in judicial or agency findings of a violation of law, we will continue to consider such findings. *See* n. 10, *supra*.

**2. 47 C.F.R., Section 73.4090, Coverage maps, Use by licensees, is removed in its entirety.**

Comparative Hearing
Review by Review Board
Settlement
Transmission First Local

Review Board approved settlement agreement after finding it will not impede fair, efficient, and equitable distribution of television service as required by Sec. 307(b) of Communications Act. Since the competing applications were for different suburbs of a large city and since television channels must serve broader areas than radio stations, no Sec. 307(b) preference could properly have been awarded to either applicant.
*–Buena Vista Telecasters of Texas, Inc.*
BC Docket No. 81–310

FCC 83R–56

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| BUENA VISTA TELECASTERS OF TEXAS, INC.<br>Richardson, Texas | BC Docket No. 81–310<br>File No. BPCT-800310KF |
| INTERNATIONAL AMERICAN BROADCASTING CO., INC.<br>Garland, Texas | BC Docket No. 81–311<br>File No. BPCT-800516KK |
| For a Construction Permit | |

MEMORANDUM OPINION AND ORDER

(Adopted: August 19, 1983; Released: August 24, 1983)

BY THE REVIEW BOARD: BOARD MEMBER BLUMENTHAL ABSENT.

1. On August 16, 1983, the two competing applicants for a new television station in the Dallas-Fort Worth urbanized area filed a joint request for approval of agreement which proposes a settlement of this comparative case. The Review Board will approve the joint request which satisfies the requirements of Section 73.3525(a) of the Commission's rules, and republication will not be required under Section 73.3525(c) for the reasons set out below, paras. 4–10.

2. In an Initial Decision, FCC 83D-1, released January 19, 1983, ALJ Luton awarded International American a decisive 47 U.S.C.

307(b) preference for bringing the first television station to Garland, the larger of the two proposed communities. The International applicant was also found to be superior when judged by the standards of the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Exceptions and briefs were filed March 4, 17, and 28, 1983, and oral argument was held April 22, 1983. On July 26, 1983, the Review Board adopted a Decision but before the Decision could be released the applicants informed the Board that a strong likelihood existed that the case could be settled, and asked that the case be held in abeyance for a short period of time.

3. In their joint request for approval of agreement filed August 16, 1983, the applicants indicate that the public interest will be served by the immediate dismissal of the Buena Vista application for Richardson, and the grant of the International application for Garland, which the ALJ had found to be superior. "Prompt approval," is alleged to be in the public interest since it will ensure "a speedy end to this litigation, thereby conserving scarce Commission resources, and allow . . . for the prompt inauguration of a new commercial broadcast service . . . ." Affidavits establish that the application to be dismissed was not filed "for the purpose of reaching or entering into an agreement whereby Buena Vista would dismiss its application." We will approve the agreement because this showing satisfies the requirements of the rules which implements the new requirements of the Communications Act. *See Oak Television of Everett*, 53 RR 2d 995 (Rev. Bd. 1983).

4. In their joint request, the applicants also allege that republication is not required by Section 73.3525(c) of the Commission's rules, because dismissal of the Buena Vista application will not unduly impede fair, efficient, and equitable distribution of television service as required by Section 307(b) of the Communications Act. We agree with this position because our analysis of the 307(b) issue in this case establishes that neither applicant is entitled to a 307(b) preference, *see Cleveland Television Corp.*, 91 FCC 2 1129 (Rev. Bd. 1982), *rev. denied* FCC 83–235, released May 18, 1983.

5. Richardson and Garland, the sites of the proposed stations, are located in Dallas County, Texas. Richardson has a population of 72,496; Garland, 138,857. Richardson is contiguous to Garland and Garland is, in turn, contiguous to Dallas (population 904,078). The proposed television station will serve between 1.5 and 2.2 million persons in the Dallas-Fort Worth urbanized area. At least four other Dallas-Fort Worth television stations provide service to these persons. *See I.D.*, paras. 6, 14, 21–22; Joint Exh. 1. As previously noted, International was awarded a decisive 307(b) preference because it would bring a first television station to Garland, which has no broadcast stations of any kind, whereas the competing applicant, Buena Vista, would provide a first television station to

Richardson, which has an existing non-commercial FM permittee as well as the smaller population (72,496 versus 138,857). *I.D.*, paras. 62–64.

6. Buena Vista, the Richardson applicant, had excepted to the award of a Section 307(b) preference, contending that circumstantial evidence suggests that International's real motive is to serve the Dallas-Fort Worth urbanized area, Buena Vista Br. at 13–30; and that, in any event, precedent establishes that the Commission has "refused to grant any Section 307(b) preference where the applicants were in fact for wide area service." Br. at 31–32. In both its reply brief and at oral argument, International defended its entitlement to a Section 307(b) preference, although counsel candidly acknowledged that he was aware of "no television case specifying contiguous suburbs and not the larger city where a decisive 307(b) preference was awarded." Tr. 429.

7. Section 307(b) requires the Commission to make a fair, efficient, and equitable distribution of radio facilities. In this case, each applicant claims that it should receive a 307(b) preference. The Richardson applicant argues that it should be preferred because it will serve the local needs of its community, whereas the Garland applicant is both designed and intended to serve the areawide needs of the Dallas-Fort Worth urbanized area. The Garland applicant responds, rather, that it should receive a § 307(b) preference because its community is nearly twice as large as Richardson and therefore has a greater need for its television station. After considering these argument in light of applicable precedent, the Review Board has concluded that neither applicant should be awarded a § 307(b) preference.

8. Our analysis does not rest on the subjective intent or the latent motives of the applicants. *Cf. Suburban Community Policy, Berwick Doctrine, Etc.*, 53 RR 2d 681 (1983) (a recent policy-making proceeding in which the Commission retroactively deleted the *Berwick* doctrine which had focused upon subjective considerations in § 307(b) determinations). More instructive, however, is a most recent comparative case involving a television applicant which sought a § 307(b) preference for providing a first station to the suburban community of Shaker Heights, Ohio. *Cleveland Television, supra*, 91 FCC 2d at 1136–1137. There, the Board reviewed the controlling authorities and concluded unanimously that a § 307(b) preference should not be awarded. Shaker Heights was $^{1}/_{20}$th the size of Cleveland, whereas Garland and Richardson are approximately $^{1}/_{7}$th and $^{1}/_{12}$th the size of the neighboring Dallas. But, the size of the suburban communities is only one of the factors considered in *Cleveland* and the other relevant cases. A critical factor is the nature of the broadcast facility sought by the competing applicants.

9. Thus, it is crucial to our instant conclusion with respect to § 307(b) that this case involves a television channel; and the Commis-

sion and the courts have recognized that such channels are scarce and must serve much broader areas than the more plentiful, less powerful, radio stations which can focus narrowly on local needs. See authorities discussed in *Cleveland, supra*, 91 FCC 2d at 1136–7; *see also Fidelity Television, Inc.* v. *FCC*, 515 F.2d 684, 694–695 (D.C. Cir. 1975). A recent Commission report establishes that it has licensed more than nine radio stations for every one television station. *See Broadcast Station Totals for June 1983*, FCC Mimeo. 1127 (the Commission has licensed 9252 radio and 1127 TV stations). And, the Board has previously noted: "Television stations typically serve much larger areas than radio stations, involve considerably greater capital investments, and require larger audiences to attract more advertising revenues . . . the number of television channels available is much more limited and, consequently, the television service area for Section 307(b) purposes 'should be defined in terms of coverage and not in terms of artificial political boundaries.'" Unlike AM or FM radio stations, television provides "an areawide, rather than a localized service." *Cleveland Television, supra*, 91 FCC 2d at 1137. *Compare Beaufort County Broadcasting Co.*, FCC 83R-51, released July 22, 1983.

10. This case involves two suburban communities contesting for one television channel in the Dallas-Fort Worth urbanized area. The Board has previously held that, after decades of Commission licensing experience, it would not extend a decisive § 307(b) preference in a novel setting absent a persuasive showing. *See generally Casey Broadcasting Co.*, 89 FCC 2d 618 (Rev. Bd. 1982), *rev. denied*, FCC 83–61, February 24, 1983. Here, the available precedent and the principles on which they rest dictate that neither applicant should receive a § 307(b) preference. As the court of appeals has pointed out: "It is clear that a broadcast licensee has an obligation to meet the needs and interests of its entire service area. This is particularly the case with respect to television stations, in view of the limited number of stations." *Stone* v. *FCC*, 446 F.2d 316, 327 (D.C. Cir. 1972). Thus, the logical and practical choice here should be based on an objective comparison of which applicant is better qualified to serve the needs of the 1.5 to 2.2 million Texans who would receive essentially the same area wide television service. *See* designated issues 4 and 5 (*I.D.*, para. 3). Accordingly, dismissal of the Buena Vista application will not unduly impede a resolution of the 307(b) issue.

11. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend, filed March 4 and May 31, 1983, by Buena Vista Telecasters of Texas, Inc. ARE GRANTED, and the amendments ARE ACCEPTED; and the joint motion to defer action filed July 29, 1983, IS GRANTED.

12. IT IS FURTHER ORDERED, That the Joint Request for Approval of Agreement, filed August 16, 1983, IS GRANTED; that

the application of International American Broadcasting Co., Inc. (File No. BPCT-800516KK) for a construction permit for a new television broadcast station to operate on Channel 23 in Garland, Texas, IS GRANTED, and that the competing application of Buena Vista Telecasters of Texas, Inc. (File No. BPCT-800310KF) IS DISMISSED, and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D–1

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| BUENA VISTA TELECASTERS OF TEXAS, INC.<br>Richardson, Texas | BC Docket No. 81–310<br>File No. BPCT-800310KF |
| INTERNATIONAL AMERICAN BROADCASTING CO., INC.<br>Garland, Texas | BC Docket No. 81–311<br>File No. BPCT-800516KK |
| For a Construction Permit | |

*Appearances*

*Robert S. Stone, Esq.* and *Rudolph L. Ennis, Esq.* of McCampbell & Young, on behalf of Richardson Family Television, Inc.; *Michael J. Hirrel, Esq.* of Arent, Fox, Kintner, Plotkin, & Kahn, on behalf of Buena Vista Telecasters of Texas, Inc.; *James Gammon, Esq.*, *Colby M. May, Esq.*, *George H. Shapiro, Esq.* and *Mark W. Amerman, Esq.* of Gammon & Grange, on behalf of International American Broadcasting; and *Norman Goldstein, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

(Issued: January 12, 1983; Released: January 19, 1983)

*I. Preliminary Statement*

1. This is a proceeding involving the mutually exclusive applications of Buena Vista Telecasters of Texas, Inc. ("Buena Vista"), International American Broadcasting Co., Inc. ("International"), and Richardson Family Television ("Richardson Family") for a new commercial television station. Buena Vista and Richardson Family filed their applications to operate on Channel 23 in Richardson, Texas. International filed its application to operate on Channel 23 in Garland, Texas.

2. The Presiding Judge dismissed Richardson Family's application with prejudice by an *Order*, FCC 82M-1450, released May 6, 1982.[1] Buena Vista and International are the remaining applicants.

[1] Since the application of Richardson Family has been dismissed with prejudice, the issues designated against Richardson Family will not be discussed herein.

3. The applications were originally designated for hearing with respect to the following issues:

(1) To determine, with respect to Buena Vista:

(a) whether it has the $988,200 needed to meet the costs of construction and operation of its proposed facility;

(b) whether, in light of the evidence adduced pursuant to paragraph (a) above, the applicant is financially qualified;

(c) whether the applicant has determined the composition of its city of license;

(d) whether the methodology used by the applicant in conducting its general public survey was random;

(e) whether, in light of the evidence adduced pursuant to paragraphs (c) through (d) above, the applicant is qualified to construct and operate its facility as proposed.

(2) To determine with respect to International:

(a) whether it has the additional $74,893 needed to meet the costs of construction of its proposed facility;

(b) whether, in light of the evidence adduced pursuant to paragraph (a) above, the applicant is financially qualified;

(c) whether the applicant has interviewed leaders of the Black and Hispanic population within the community it proposes to serve;

(d) whether the applicant proposes broadcast matter designed to meet the problems, needs and interests of the community as ascertained by the applicant;

(e) whether, in light of the evidence adduced pursuant to paragraphs (c) through (d) above, the applicant is qualified to construct and operate its facility as proposed.

(3) To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of broadcast service.

(4) To determine, if it is concluded that a choice among the applicants should not be based on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

(5) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

4. The financial issues designated against International (Issues 2(a) and 2(b) above) were resolved in International's favor by summary decision granted by *Memorandum Opinion and Order*, FCC 81M-3051, released September 24, 1981. Summary decision was granted in favor of International on the community ascertainment issues (Issues 2(c), 2(d) and 2(e) above) by *Memorandum Opinion and Order*, FCC 81M-3328, released October 19, 1981. The ascertainment issues designated against Buena Vista (Issues 1(c), 1(d) and 1(e) above) were resolved in Buena Vista's favor by *Order*, FCC 81M-3442, released October 29, 1981. The financial issues designated against

Buena Vista (Issues 1(a) and 1(b) above) were resolved in favor of Buena Vista by summary decision by *Memorandum Opinion and Order*, FCC 81M-3455, released October 30, 1981. Thus, the only issues remaining for resolution are the Section 307(b) issue (Issue 3 above) and the standard comparative issue (Issue 4 above).

5. Hearings were held in Washington, D. C. from January 11, 1982 through January 13, 1982. The record in this proceeding was closed by *Order*, FCC 82M-1488, released May 6, 1982.[2]

## *II. Findings of Fact*

### A. *Section 307(b) Issue - Comparison of Communities*

#### 1. *Garland, Texas*

6. Garland, Texas, the second most populous city in Dallas County, has a population of 138,857 within its 43.2 sq. miles. Garland had 48,365 housing units in 1980 and $111,415,082 worth of building permits were issued in 1979. In 1970, Garland's population was 81,437, and it had 24,376 housing units. In 1970, $51,701,977 worth of building permits were granted. (IABC Ex. 1, p. 1).

7. Garland has a council-manager form of government, and the city council includes a mayor and eight council members. Garland's annual budget (1980–1981) is $100.6 million, and city government employs 1,261 persons. (IABC Ex. 1, p. 1). Garland's police department has 264 members, and its fire department has 154 personnel operating from six locations. Garland also has a 24-hour emergency medical service, which is operated by the fire department, and which is staffed by 28 paramedics and 15 emergency medical technicians. (IABC Ex. 1, p. 2).

8. Approximately 22,000 industrial employees work in Garland, with an annual payroll of $120,000,000. Thirty-five of the approximately 300 manufacturing firms in Garland employ more than 100 persons. (IABC Ex. 1, p. 2).

9. Retail sales in 1978 were approximately $566,076,000. (IABC Ex. 1, p. 2). Bank deposits at banks in the city rose from $72,240,071 in 1970 to $298,554,093 in 1980. Deposits in savings and loan institutions rose from $25,677,631 in 1970 to $115,738,517 in 1980. Garland's electric power needs are supplied primarily by Garland Power and Light, the third largest municipal electric utility in Texas. (IABC Ex. 1, p. 3).

10. The enrollment of the Garland Independent School District rose from 21,347 in 1970 to 30,026 in 1980, with 4 high schools, 10 middle schools, and 31 elementary schools (IABC Ex. 1, pp. 3–4, 8). Post-secondary education is available in Garland at Abilene Chris-

[2] All references herein to the hearing transcripts in this proceeding will be abbreviated "Tr. ___ ." All references to exhibits of the parties will be abbreviated "Buena Vista Ex. ___ ," "International Ex. ___ ," or "Joint Ex. ___ ."

tian University's Dallas Campus, the East Texas State University Extension in Garland, and at Richland College, a community college which adjoins the Garland city limits. Garland's own library system includes a main library and two branches with 180,000 volumes and other materials (IABC Ex. 1, p. 4).

11. The City of Garland offers public recreation facilities, including more than 60 parks, and 5 recreation centers featuring indoor sports and instruction, 4 major swimming pools, 48 tennis courts, an equestrian park, and jogging and bike trails, totalling more than 2,000 acres. (IABC Ex. 1, p. 4).

12. Garland has more than 70 civic and service clubs, and has 3 senior citizen centers. A new civic center is planned for Garland which will include a cultural arts center. (IABC Ex. 1, p. 5). Garland has 3 hospitals, with 400 patient beds and approximately 200 physicians on hospital staff. Several dental clinics are located in Garland (IABC Ex. 1, p. 3). Eighty-five churches are located in Garland. (IABC Ex. 1, p. 5).

13. There are no radio or television stations in Garland, but a daily newspaper, the *Garland Daily News* is published there. (IABC Ex. 1, p. 5).

2. *Richardson, Texas*

14. The population of Richardson, the fourth most populous city in Dallas County, rose from 48,405 in 1970 to 72,496 in 1980. According to the 1980 United States Census, there are 25,391 household units in Richardson, an increase of 81.4% from 1970. Richardson has a council-manager form of government with a seven-member city council, an annual operating budget of $15.8 million, and 103 police officers and 115 firemen. (IABC Ex. 1, p. 6).

15. Eight of the approximately 106 manufacturing firms in Richardson have more than 100 employees. The 1977 Census of Retail Trade lists the total number of establishments in Richardson as 652 and gross sales of $264,435,000, up from the 1972 census figure of 458 establishments with sales of $98,451,000. Richardson's banks hold deposits of $436,000,000. (IABC Ex. 1, p. 7). Richardson's electric power needs are supplied by Texas Power and Light Company. (IABC Ex. 1, p. 7; Buena Vista Ex. 11, p. 3).

16. The Richardson Independent School District has thirty-five elementary schools with a total enrollment of 18,697 students, and ten junior high schools and four high schools with a total enrollment of 18,238 students (Buena Vista Ex. 11, p. 8). Private elementary and secondary schools serve 537 students. Richardson has a municipal library with approximately 155,000 volumes (Buena Vista Ex. 11, p. 11). The University of Texas at Dallas is located in Richardson and provides college education at the junior, senior and graduate levels in a variety of fields to approximately 6,000 students. Other Richardson colleges are Richland Community College (located be-

tween Richardson and Garland) and A&M Research and Extension Center at Dallas (Buena Vista Ex. 11, par. 17).

17. Richardson has 16 parks, 5 municipal swimming pools, 2 recreational centers, 17 softball fields, 28 tennis courts, and 2 public golf courses which total 206 acres. (IABC Ex. 1, p. 8; Buena Vista Ex. 11, p. 11).

18. Richardson has 1 hospital with 116 beds. Richardson also has 2 privately-owned nursing homes (Buena Vista Ex. 11, p. 12). There are 121 physicians in Richardson and 76 dentists (IABC Ex. 1, p. 7). There are 47 churches in Richardson and Shilo Airport is located in the city (IABC Ex. 1, p. 2).

19. Richardson has approximately 80 service organizations and cultural activities, including the Richardson Symphony and Meyers Charles Orchestras. In addition Richardson's Civic Center is available for cultural events. (IABC Ex. 1, p. 9; Buena Vista Ex. 11, p. 9).

20. Richardson has no standard broadcast or television stations. An FM radio assignment to St. Luke's Educational Foundation on 88.1 mHz has been made, but the station is not yet on the air. Richardson has a daily newspaper, *The Richardson Daily News.* (IABC Ex. 1, p. 9).

B. *Reception Data*

21. A comparison of the areas and populations proposed to be served by Buena Vista's and IABC's proposals reveals the following differences:

| *Grade B* | *Population* | *Area (Sq. Miles)* |
|---|---|---|
| LABC | 2,201,362 | 4,616 |
| Buena Vista | 1,511,290 | 2,908 |
| Difference | 690,072 | 1,708 |
| LABC Advantage | +43% | +59% |
| Differential Area | | |
| Areas Served Only by LABC | 717,194 | 2,307 |
| Served Only By Buena Vista | 27,122 | 599 |

(Joint Ex. 1, p. 5).

22. All Grade B differential areas presently receive service from 4 Dallas-Ft. Worth stations. In addition, a fifth Grade B service is provided in this area from either a Dallas station or an Ardmore, Oklahoma station. Further, 3 other Dallas-Ft. Worth stations provide Grade B service to portions of the differential areas. (Joint Ex. 1, pp. 2, 5; Joint Ex. 2, p. 1).

## *III. Comparative Issues*

A. *Diversification of Ownership and Control*

23. Buena Vista has no interest in any authorized broadcast facility or any other medium of mass communications. Buena Vista principal Leon Crosby owns 48 percent of the voting stock and 100

percent of the nonvoting preferred stock of Hispanic Broadcasters, Inc., licensee of Television Station KBSA-TV, Guasti, California. Buena Vista principal Debra Olivas[3] owns 21.15 percent of the voting stock of United Minority Broadcasters, Inc. which holds 52 percent of the voting stock of Hispanic Broadcasters, Inc., licensee of KBSA, Guasti, California. Leon Crosby and Debra Olivas are Chairman of the Board and President, respectively, of Hispanic Broadcasters, Inc. (Buena Vista Ex. 10, p. 1). Station KBSA-TV is not presently operational. Guasti, a suburb of Los Angeles, California, is more than 1,000 miles from Richardson, and is part of the second-ranked Los Angeles television market (IABC, Ex. 9, pp. 2–3).

B. *Integration of Ownership and Management*

1. *Buena Vista*

24. Buena Vista is comprised of the following persons holding the following percentages of voting stock and holding the following offices:

| *Individual* | *Voting Stock Held* | *Office* | *Director* |
|---|---|---|---|
| Leon A. Crosby | 25% | President | Yes |
| Florence Coaxum | 8% | Vice President | Yes |
| Mamie Ewing | 10% | Secretary | |
| George W. Fair | 10% | Vice President | |
| Myron Watkins | 8% | Vice President | |
| Timothy L. Crosby | 7% | Vice President | Yes |
| Kevin McMahan | 22% | None | |
| James L. Crawford | 10% | Assistant Vice President | |

(Buena Vista Ex. 1).

25. Of Buena Vista's eight stockholders, four are proposed to be integrated into the ownership and management of its station should Buena Vista be granted a construction permit.[4] Florence Coaxum, Timothy L. Crosby and James L. Crawford are proposed to be involved in station management on a full-time basis (40 hours per week), and George W. Fair is proposed to work at the station on a part-time basis (20 hours per week). (Buena Vista Ex. 3, p. 1; Buena Vista Ex. 4, p. 1; Buena Vista Ex. 5, p. 1; Buena Vista Ex. 7, p. 1).

26. Timothy L. Crosby, a holder of 7% of Buena Vista's voting stock, will be the full-time Assistant Station Manager of Buena Vista's Richardson station. He will supervise and coordinate the

[3] Although Debra Olivas has withdrawn from Buena Vista's application, and been replaced by Kevin McMahan, for comparative purposes, Buena Vista remains charged with Olivas' ownership interest in station KBSA-TV. *See* Order, FCC 81M-3443, released October 29, 1981.

[4] The integration proposal for Leon A. Crosby was rejected by the Presiding Judge because it was at variance from Buena Vista's application. (Tr. 81–82).

work of the station's sales, production and programming staffs. His particular area of responsibility will be the sale of commercial and program time. This function will require direct supervision of the sales staff, supervision of the production staff when commercials are produced at the station, and coordination with the programming staff to develop appropriate program vehicles for the sale of commercial time. If Buena Vista is granted a construction permit, Timothy Crosby will reside in Richardson, Texas. (Buena Vista Exs. 1 and 7).

27. From June 1978 to September 1980, Mr. Crosby was Assistant Business Manager of KEMO-TV, San Francisco, California. In this position, he supervised collection of the station's receivables, was responsible for the station's banking and cash management, reviewed commercial and program time sales contracts, and advised the station's General Manager regarding the station's business functions. From June 1975 to June 1978, Mr. Crosby was a technical director and production assistant of KMOW-TV. In these positions, he directed particular commercial and program productions and operated and supervised operation of lighting, audio and video equipment. (Buena Vista Ex. 7).

28. Florence Coaxum, who owns 8% of Buena Vista's voting stock, will be the full-time Executive Administrator at Buena Vista's Richardson station. (Buena Vista Exs. 1 and 3). Ms. Coaxum will be responsible for recruitment of all personnel, reviewing the qualifications of job applicants, hiring staff personnel, recommending to the General Manager management and professional personnel to be hired, supervising the station's internal job training and promotion programs, and determining the salaries of the station's non-professional and non-management staff. She will also supervise implementation of Buena Vista's EEO program. (Buena Vista Ex. 3, p. 1). In addition, Ms. Coaxum will be responsible for reviewing and, as necessary, negotiating contracts and commercial transactions, and ensuring compliance with state and federal labor law and local libel law. She will also have on-site responsibility for advising the General Manager and other personnel regarding FCC rules and regulations. (Buena Vista Ex. 3, p. 2).

29. Ms. Coaxum is now in her second year of law school at Texas Southern University in Houston and works part-time as a law clerk for a general practice attorney in Houston. Before enrolling in law school, Ms. Coaxum worked as a counselor at an emergency crisis intervention center in Austin, Texas for approximately $1^1/_2$ years. In this position, she provided emergency assistance and counseling to individuals, particularly juveniles, who were experiencing family problems. Before holding this position, Ms. Coaxum was in the United States Army Military Police at Fort Hood, Texas for three years. She served first in patrol duty and then as a case worker, providing social counseling to military families. When she left the

Army, she held the rank of Staff Sergeant. She holds a Masters degree in social work from Our Lady of the Lake College in San Antonio, Texas. (Buena Vista Ex. 3, p. 3).

30. Ms. Coaxum is a Black female. She resides in Houston, Texas and, if Buena Vista is granted a construction permit, will move to Richardson, Texas. (Buena Vista Ex. 3, p. 4).

31. James L. Crawford, who holds 10% of Buena Vista's voting stock, will be the full-time Community Relations Director at Buena Vista's station. (Buena Vista Exs. 1 and 5). He will be responsible for representing the station at community functions. He will attend Richardson City Council meetings, as well as significant meetings of other Richardson city boards, such as boards of zoning and education. Mr. Crawford will conduct Buena Vista's community leader ascertainment interviews. He will also serve as the contact person for members of the Richardson community who have complaints and suggestions regarding Buena Vista's station. (Buena Vista Ex. 5).

32. As Community Relations Director, Mr. Crawford will direct Buena Vista's Community Out-Reach programs. Many of these programs will use Buena Vista's broadcast facilities and Mr. Crawford will coordinate and supervise, in conjunction with the Program Director, production of all such broadcast material. He will be responsible for selecting public service announcements to be broadcast on the station and, together with the programming director, will supervise the production of local public service announcements produced by Buena Vista. Mr. Crawford will report to the General Manager concerning community problems and needs. He will also assist the station's Public Service Director if necessary. (Buena Vista Ex. 5, p. 2).

33. Mr. Crawford, a Black male, now resides in Union City, California and will move to and reside in Richardson if Buena Vista is granted a construction permit. (Buena Vista Ex. 5, p. 3).

34. Dr. George W. Fair, owner of 10% of Buena Vista's voting stock, will be the Public Service Director at Buena Vista's station. (Buena Vista Exs. 1 and 4). Dr. Fair will devote at least 20 hours per week to his work at the station. As Public Service Director, Dr. Fair will plan, coordinate and supervise the production of public affairs programming. (Buena Vista Ex. 4, pp. 1, 3; Tr. 223).

35. Dr. Fair is a Black male. He has resided in Dallas, Texas since 1979 in a neighborhood adjacent to Richardson. Before moving to Dallas, Dr. Fair resided in Richardson from 1975 to 1979. (Buena Vista Ex. 4, p. 4).

36. Dr. Fair is an associate professor of special education at the University of Texas at Dallas, which is located in Richardson. He holds a Masters degree in special education and a Doctoral degree in education from the University of Pittsburgh. Dr. Fair has served as both a paid and volunteer consultant for the Richardson Independent School District and the Dallas Independent School District. He

serves on the curriculum development committee of the Richardson Independent School District and is an active member of the Board of Trustees of the Special Care School of Dallas and of the Board of Directors of the Dallas Work Opportunity Retraining Center. He has actively participated in the fund raising compaigns of the Richardson YMCA. (Buena Vista Ex. 4, p. 5).

37. Dr. Fair is chairperson of the Minority Affairs Committee for the Division on Career Development of the Council for Exceptional Children. He is also chairperson of the faculty committee for recruitment of minority students at the University of Texas at Dallas, and he was chairperson of the Minority Affairs Committee for the 1977 annual convention of the Council for Exceptional Children. He has written several articles in professional journals about the special problems of minority handicapped children. (Buena Vista Ex. 4, p. 6).

38. In 1977 and 1978, Dr. Fair was responsible for two television programs transmitted over KWU-30, an instructional fixed television service station operated by the Texas Association for Graduate Education Researchers. These courses provided graduate level instruction for public school teachers in the Dallas area. Dr. Fair assembled and prepared the material for use in the course and taught the course on television. (Buena Vista Ex. 4, p. 7).

39. The hours Dr. Fair devotes to his teaching responsibilities at the University of Texas and the hours which will be required for the performance of his duties as Buena Vista's Public Service Director are generally flexible. Dr. Fair's Mondays, Wednesdays and Thursdays are substantially free of course work and will ordinarily be available for his duties at the station. In addition, he will allocate as necessary one or two hours each weekday evening to the station's affairs. He will also be free to work at the station on weekends if required to fulfill his responsibilities as the station's Public Service Director. (Buena Vista Ex. 4, p. 8).

2. *International*

40. International is a non-profit, non-stock corporation. (International Ex. 4, Buena Vista Ex. 13, p. 24). The President and Chairman of International's Board of Directors is Dr. Elizabeth R. Vaughan. The other officers and directors are Mrs. Geri S. Morgan, Vice-President, Treasurer and Director and Miss Melinda S. Fleming, Secretary and Director. (IABC, Ex. 4). All three directors will be involved in station management should International be granted a construction permit. Geri S. Morgan and Melinda S. Fleming will be involved in station management on a full-time basis (40 hours per week) and Dr. Elizabeth R. Vaughan will work at the station on a part-time basis (20 hours per week).

41. From 1962–1970 and 1976 to the present, Dr. Elizabeth R. Vaughan has resided in Dallas. From 1970–1976, Dr. Vaughan lived

in Garland, Texas. She was born in El Paso, Texas on July 28, 1940 and is a U.S. citizen. (IABC Ex. 5, p. 1).

42. Dr. Vaughan will be employed as the part-time (20 hours per week) Program Director of International's station. (IABC Ex. 5, p. 1). In that position, she will screen programs that are to be aired, evaluate current programs, and evaluate applications for program time. (Tr. 264–265).

43. Dr. Vaughan attended grade school and high school in El Paso, Texas. She attended Texas Western College, El Paso, from 1958–1959, and attended the University of Texas, Austin, Texas, from 1959–1962, receiving her BA in English in 1962.

44. In 1966, Dr. Vaughan received an MD degree from the University of Texas Southwestern Medical School in Dallas, Texas, followed by an interneship in pediatrics (1966–1967) at Children's Medical Center, Dallas, and a residency in Ophthalmology (1967–1970) at Parkland Memorial Hospital, Dallas, Texas. After completion of her training in 1970, Dr. Vaughan began the private practice of ophthamology in the Dallas/Ft. Worth area. (IABC Ex. 5, p. 2).

45. Dr. Vaughan's civic activities include participation from approximately 1970–1972 as a member of the Pilot Club, an organization which sponsors a home in Dallas for rehabilitating mentally retarded women and which sponsored schools for deaf children. (IABC Ex. 5, p. 4; Tr. 261–262).

46. Dr. Vaughan's professional activities include staff membership since the early 1970's at the following Dallas/Ft. Worth area hospitals; Parkland Memorial Hospital; Presbyterian Hospital; Baylor University Medical Center; Mary Shiels Hospital; and Veterans Administration Hospital. In approximately 1970, Dr. Vaughan received an appointment as clinical instructor and ophthalmologist at the University of Texas Southwestern Medical School in Dallas, Texas, and she continues in that position. (IABC Ex. 5, p. 2).

47. Dr. Vaughan is a member of the following organizations: Christian Medical Society; American Medical Association; Dallas County Medical Society; Texas Medical Association; American Association of Ophthalmology; Dallas Academy of Ophthalmology; American Academy of Ophthalmology; Contact Lens Association of Ophthalmologists; International Eye Foundation; Society of Eye Surgeons; Texas Society for the Prevention of Blindness; and the American Intra-Ocular Implant Society. She has been a member of most of these organizations since the early 1970's. (IABC Ex. 5, p. 3).

48. Dr. Vaughan is co-hostees of "The End Crowd," a one-hour program featuring various guests and music which is "cablecast" on weekday evenings, Monday through Friday from 8–9 p.m. on Storer Cable TV, Garland, public access Channel 10, other Storer Cable TV outlets in the Dallas/Ft. Worth area, and on Cable Vision of Odessa, Odessa, Texas. (Tr. 258–259). In addition, Dr. Vaughan is heard on the radio program "Dr. Vaughan Presents," which is produced by

Dr. Vaughan and which is aired Monday through Friday at 5:45 p.m. on KWJS(FM), Arlington, Texas. On this program, Dr. Vaughan offers teachings from the Bible. (IABC Ex. 5, pp. 4–5; Tr. 256–257).

49. Dr. Vaughan currently devotes approximately 35 hours per week to her duties as an opthalmologist, and spends approximately five hours per week in her radio ministry activities. Dr. Vaughan will devote a minimum of 20 hours per week to her duties at IABC. (IABC Ex. 5, p. 6; Tr. 248, 255).

50. Geri S. Morgan has resided in the station's proposed service area all of her life. She will be the full-time Production Director of International's station. (IABC Ex. 6, p. 1).

51. Mrs. Morgan was employed from 1977 through 1980 as Office Manager of International Christian Center Church and she has served as Organist of that church since 1977. She was employed by Elizabeth Vaughan Ministries, Inc. from 1978 through 1981. Mrs. Morgan is currently employed as Vice-President and Treasurer of International, and works at least 40 hours per week in that position. (IABC Ex. 6, p. 2; Tr. 349).

52. Mrs. Morgan is co-hostess of "The End Crowd", a 1-hour program featuring guests and music which is "cablecast" on weekday evenings, Monday through Friday. In addition, Mrs. Morgan supervises International's production activities for "The End Crowd" program, including obtraining guests for the program, and supervising the director, switcher, and the cameramen and audio technicians. (IABC Ex. 6, p. 2; Tr. 351). Mrs. Morgan's duties as Production Director at International's station will be similar to the ones she has performed with respect to "The End Crowd." (Tr. 352).

53. From 1957 to the present, Mrs. Morgan has worked with civic and charitable organizations in the Dallas and Fort Worth metropolitan area as a pianist and organist, including: the Parent-Teachers Association; Dad's Club; Firemen's Convention in Fort Worth (1960); State Fair of Texas (1955-early 1960's); and American Heart Association. (IABC Ex. 6, p. 3; Tr. 353–356). In addition, Mrs. Morgan worked as a fund raiser for the March of Dimes for many years (through the early to mid-1970's) and for Teens Against Polio (early 1960's). (IABC Ex. 6, p. 3; Tr. 355–356). Also, Mrs. Morgan was Secretary of the House of Faith, Inc., a Dallas home for deliquent teenage girls from 1970–1975. From 1977–1978, Mrs. Morgan was Coordinator of the Mobile Prayer Chapel, a Christian street ministry.

54. Miss Melinda S. Fleming, a resident of Dallas, Texas, has lived in the proposed service area of International's station since 1977. Miss Fleming will be the full-time Sales Manager of International's station. (IABC Ex. 7, p. 1).

55. Miss Fleming lived and attended schools and college in Lindale, Texas from 1955 until 1975. In 1975, Miss Fleming received her Associate of Arts Degree in Data Processing, graduating from

Tyler Junior College in Tyler, Texas. From 1980 to the present, Miss Fleming has been employed as Office Manager by International, a salaried position. (IABC Ex. 7, p. 2; Tr. 359).

56. Miss Fleming's civic activities include: Member of Lindale Methodist Church Youth Fellowship, Secretary/Treasurer, Lindale, Texas (until 1973); Member of District United Methodist Youth Fellowship, Lindale, Texas area (until 1973); and Member of Baptist Student Union at Texas A&M University, College Station, Texas (IABC Ex. 7, p. 3; Tr. 368–370). She was a volunteer with the March of Dimes during the late 1960's in Tyler, Texas, and with the Jerry Lewis Muscular Dystrophy Telethon in Lindale, Texas. (IABC Ex. 7, p. 3; Tr. 370–371). In addition, Miss Fleming has been a member of International Christian Center Church, Garland, Texas where she is the audio tape operator and a participant in "Sisters of Love", a women's fellowship of that church. (IABC Ex. 7, p. 3).

C. *Auxiliary Power*

57. International will obtain an auxiliary power supply sufficient to allow International to continue broadcast service uninterrupted during emergencies with substantially full power. In addition, the proposed transmitter building will house both a standby power plant and a small emergency studio to ensure uninterrupted service. (IABC Ex. 4).[5]

## *IV. Conclusions of Law*

A. *Section 307(b)*

58. In its proposed findings, Buena Vista once again presses its theory, rejected earlier by *Order*, FCC 82M-1477, released May 6, 1982, that International "intends" to provide primary service to the Dallas/Ft. Worth metropolitan area instead of Garland. Thus, Buena Vista claims that it is entitled to a decisive preference under the transmission needs aspect of Section 307(b) because it proposes to provide a first transmission service to Richardson, Texas, whereas International proposes a ninth service to the Dallas/Ft. Worth metropolitan area.

59. Buena Vista's argument respecting International's "intent" is based on *Charles J. Lanphier*, 31 FCC 212 (1961), *Island Teleradio Service, Inc.*, 30 FCC 52 (1961), and *Speidel Broadcasting Corp.*, 35 FCC 74 (1963), all cases holding that "suburban community" type considerations are part of the evaluation made under a Section 307(b) issue in *AM radio* proceedings. The suburban community policy involves an applicant's intent to direct its programming efforts and overall broadcast operations toward a nearby larger

[5] *See*, International's November 14, 1980 Amendment of its FCC Form 301 Application.

community rather than to the smaller suburban community it has specified as its community of license. The presumption respecting an applicant's intent which arises in these instances (if certain factual elements are present) is unnecessary when specific allocations are assigned by the Commission, as is the case with FM radio and television channels. The Commission stated in *Hall Broadcasting*, 71 FCC 2d 235, 45 RR 2d 539 (1979);

> "Since channels are preassigned to communities by the Table of FM Channel Assignments (Section 73.202 of the Rules), no such presumption for FM applications has ever been established nor has one ever been necessary. This is because our assignment of an FM channel to a community located proximate to a large community reflects our recognition that operation on that channel with maximum facilities (i.e., transmitting power and antenna height) permitted may result in coverage of the larger community (footnote omitted)." *Hall Broadcasting*, at 542.

Similiarly, no "suburban community" presumption applies to television applicants since the Commission has assigned television channels (Rule 73.606). Buena Vista has shown nothing which indicates that an evaluation of International's "intent" to serve Garland is included in the designated Section 307(b) issue, and no evidence suggests that International "intends" to serve any community other than its designated community of license, Garland, Texas.

60. Buena Vista next argues that International is not entitled to a Section 307(b) preference because International will provide an "area wide" service. Buena Vista cites several cases for that proposition, among them, *Charles Vanda*, 4 FCC 2d 655 (1966) and *St. Louis Telecast, Inc.*, 22 FCC 2d 625 (1957), each of them television proceedings including an evaluation under Section 307(b). In *Charles Vanda, supra*, it was determined that, with respect to each of the competing proposals, the role of providing a local transmission outlet would be a distinctly minor one. The orentation of each of the proposals was decidely toward the Las Vegas - Henderson - Boulder City area, rather than toward the designated communities of Henderson and Boulder City:

> "Of the persons served by both proposals, 64,405 preside in Las Vegas, constituting well over 50 percent of the applicants' city grade population. Each proposal would provide a city grade signal to both Henderson and Boulder City as well as Las Vegas. A majority of the revenue of the proposed operations would be derived from non-local sources (other than Boulder City or Henderson) [footnote omitted]. In programming, both applicants propose substantial use of Las Vegas talent. Moreover, an examination of the applicants' proposed programming schedules reveals very little that can be identified as being oriented to the particular local needs and interests of the specified community as opposed to the needs and interests of the Las Vegas - Henderson - Boulder City area." *Charles Vanda, supra*, at 658.

Here, nothing suggests that International proposes such an "area wide" service. The fact that International's coverage will also serve the broader Dallas/Ft. Worth area does not undermine Internation-

al's primary commitment to serve Garland. Buena Vista broadly asserts that International's advertising revenue will arise from sources outside Garland. However, other than some passing references to the possibility of acquiring revenues from some religious organizations and possible national advertisers, the record does not establish the sources nor the amounts of prospective revenues from these sources, and that is undoubtedly because such matters were not encompassed within the scope of the designated issue. Similarly, the fact that International's proposed programming will also serve the larger area does not undermine the fact that its primary service is to Garland. Again, the record does not establish the precise programming which International proposes, since the nature of the specific programming was not encompassed within the scope of the designated issue.

61. In *St. Louis Telecast, supra*, the specified community of license of the competing applicants included a large principal city and one of its contiguous suburbs. It was concluded that the suburb was not a "separate community" for Section 307(b) purposes. Here, the applicants propose to serve the communities of Garland and Richardson, Texas, respectively, communities located near the larger cities of Dallas and Fort Worth. There is simply no question that Garland and Richardson constitute separate communities, each worthy of the facility applied for.

62. The communities of Richardson and Garland are similar in every way except as to population and size. Garland's population is greater than Richardsons by a factor of almost two to one (138,857 to 72,486). Both are thriving economically, and while both Garland and Richardson are growing, Garland is growing at a substanially faster rate. Between 1970 and 1980, Garland's population increased 71 percent, while Richardson's increased 50 percent. Both Garland and Richardson have a council-manager form of government, Garland's annual budget is $100.6 million and Richardson's is $15.8 million. Garland has 264 policemen and 154 firemen; Richardson had 103 policemen and 115 firemen. Retail sales in Garland in 1978 were about $566 million; retail sales in Richardson in 1981 were about $232 million. Thirty-five of the approximately 300 manufacturing firms in Garland employ more than 100 persons; eight of the approximately 106 manufacturing firms in Richardson employ more than 100 persons. About 22,000 industrial employees work in Garland. In 1980, Garland had 48,365 housing units and Richardson had 25,371. Garland has three hospitals, with 400 patient beds and approximately 200 physicians on staff; Richardson has one hospital with 116 beds and 121 physicians. Garland has 85 churches and Richardson has 47. Garland has more than 2,000 acres of public recreation facilities, while Richardson has 206 acres. Garland has its own municipal electric utility, the third largest in the state of Texas; Richardson obtains its electricity from Texas Power and Light.

Garland has a main library and two branch libraries with 180,000 volumes; Richardson one library has 155,000 volumes.

63. There are no television or standard broadcast radio stations in Garland or Richardson. A non-commercial educational FM radio construction permit has been granted in Richardson, but the station is not yet on the air. Both Garland and Richardson have daily newspapers.

64. An analysis of the relative needs for television service in the two communities indicates that Garland's need for a television station is clearly greater than that of Richardson. The significantly greater population of Garland, as well as the existence of a non-commercial educational FM permittee in Richardson require that a decisive preference under the transmission needs aspect of Section 307(b) be granted to International.

65. The television services already available in the proposed coverage areas of the applicants (reception needs) is the second element in a standard Section 307(b) evaluation. International would provide a sixth grade B television signal to 690,072 persons not served by Buena Vista's proposal. This requires that a slight preference under the reception aspect be awarded to International as well.

B. *Comparative Analysis*

*Diversification*

66. The diversification criterion "is a factor of primary significance" since it constitutes the primary objective of the licensing scheme. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396, 5 RR 2d 1901, 1908 (1965).

67. Leon Crosby, a 25 percent stockholder in Buena Vista, holds 48 percent of the voting stock and 100 percent of the non-voting preferred stock of Hispanic Broadcasters, Inc., licensee of KBSA-TV, Guasti, California. Deborah Olivas, a former 22 percent stockholder in Buena Vista whose broadcast interest is to be attributed to Buena Vista, holds 21.15 percent of the voting stock of United Minority Broadcasters, Inc. United Minority owns 52 percent of the voting stock of Hispanic Broadcasters. International has no ownership interest in any medium of mass communications.

68. The substantial stock ownership of the licensee of KBSA-TV by Leon Crosby, considered with the additional ownership of Debra Olivas, requires that a moderate diversification preference be awarded to International, in view of International's total lack of mass media interests.

*Integration of Ownership and Management*

69. Buena Vista proposes to integrate four of its eight stockholders into station management. Florence Coaxum, Timothy Crosby and

James L. Crawford are proposed to be involved in station management on a full-time basis (40 hours per week), and Buena Vista is entitled to 25 percent quantitative integration credit for their participation. Buena Vista is also entitled to 10 percent part-time quantitative credit for the involvement of Dr. George W. Fair, who is proposed to work at the station 20 hours per week.[6]

70. The quantitative integration of Buena Vista's principals is enhanced by their proposed local residence, history of participation in civic affairs within the community of Richardson or the larger proposed service area and their broadcast experience.

71. The integration proposals of Ms. Coaxum (8 percent stockholder) and Mr. Crawford (10 percent stockholder) are qualitatively enhanced because they are Black, and because Ms. Coaxum is a female. Timothy L. Crosby's integration is qualitatively enhanced due to his past broadcast experience. The integration proposals of all three are qualitatively enhanced because they have proposed to move to Buena Vista's proposed city of license, Richardson. Dr. Fair's part-time 10 percent quantitative integration credit is enhanced by his local residence of several years duration and by his substantial involvement in local civic affairs. Additionally, qualitative integration enhancement is awarded for Dr. Fair's minority status.

72. International is a non-profit, non-stock corporation and has three directors. With respect to nonstock corporations, "the Commission has consistently held that those persons holding relationships of personal interest and responsibility comparable to those of principals can be treated as owners". *Farragut Television Corporation*, 5 FCC 2d 93, 98, 8 RR 2d 552 (1966). Further, "the officers and directors of [a nonstock, nonprofit corporation] will be considered comparable to principals in a stock corporation [for integration purposes]". *See, Loyola University*, 12 RR 1017 (1956); *City of Jacksonville*, FCC 56–799, 12 RR 113 (1956); *Triad Television Corp.*, 25 FCC 848, 16 RR 501 (1958).

73. International is entitled to quantitative credit for 66.67 percent full-time integration since two of its directors, Geri S. Morgan (33.33 percent) and Melinda S. Fleming (33.33 percent), are proposed to work at the station full time (40 hours per week) in management positions. Mrs. Morgan will work at the station full time as Production Director and Miss Fleming will work full time as Sales Manager. In addition, International is entitled to 33.33 percent part-time integration credit for the participation of Dr. Elizabeth R. Vaughan who will be working in station management on a part-time basis.

---

[6] International argues that Dr. Fair's integration proposal should not be credited. The Presiding Judge disagrees. Dr. Fair's Mondays, Wednesdays and Fridays will ordinarily permit him to work at the station. He will allocate one or two hours each weekday to the station, and will also work on weekends to fulfill his 20 hour per week commitment. (Buena Vista Ex. 4).

74. Dr. Vaughan will work at the station part-time as Program Director. International broadly attacks that proposal, claiming that no credit can be awarded for Dr. Vaughan's part-time participation because of her other time commitments. However, the evidence establishes that Dr. Vaughan's outside time commitments will be 35 hours per week in her practice as an opthalmologist, five hours per week in her radio ministry activities, and four and one-half to six hours per week (in addition to her 20 hours per week as International's Program Director) and hosting television programs broadcast on International's station, a total of $44^1/_2$ to 46 hours per week. Dr. Vaughan's proposal to work 20 hours per week at International's station in addition to her present commitments, even including additional hours for commuting, seems clearly capable of effectuation.

75. International warrants a moderate preference on the integration criterion, since its 66.67 percent full-time integration credit exceeds Buena Vista's 25 percent full-time credit. International's credit for part-time integration exceeds Buena Vista's by 33.33 percent to 10 percent. International's integration proposal is qualitatively enhanced by the long-standing local residence of its directors, the civic involvement of Dr. Elizabeth Vaughan, and the female status of all its directors.

*Auxiliary Power*

76. International has made an auxiliary power proposal; Buena Vista has not. Therefore, International is entitled to a slight preference for its auxiliary power proposal.

*Overall Comparative Analysis*

77. Under the transmission needs aspect of the standard Section 307(b) issue, International warrants a decisive preference for its proposal to serve Garland, Texas. In addition, International garners a slight preference with respect to the reception needs aspect of the standard Section 307(b) issue because International would provide a sixth Grade B television signal to over 690,000 persons not served by Buena Vista's proposal. Thus, analysis of the proposals of International and Buena Vista requires that a grant be made to International, since it has a decisive preference under the transmission needs aspect of the standard Section 307(b) issue.

78. International is also superior to Buena Vista under the standard comparative issue. Under the diversification criterion, International is awarded a substantial preference due to the substantial stock ownership by Buena Vista principals in a television licensee, as compared to the lack of mass media interests for diversification purposes by either International or its principals. In addition, International is granted moderate preference for its proposal to integrate 66.67 percent of its principals full time, and

33.33 percent of its principals part-time, as compared to Buena Vista's 25 percent full-time integration proposal and 10 percent part-time integration proposal.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision IS TAKEN by a party or IT IS REVIEWED by the Commission on its own motion in accordance with Section 1.276 of the Rules, the application of International American Broadcasting Co., Inc. IS GRANTED and the application of Buena Vista Telecasters of Texas, Inc. IS DENIED.[7]

FEDERAL COMMUNICATIONS COMMISSION
EDWARD LUTON, *Administrative Law Judge*

---

[7] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its public release pursuant to Section 1.276(d).

Candor
Financial Qualifications, Loan Commitment, Ability to Meet
Misrepresentation, Financial Qualifications

Applicant found financially unqualified because of lack of good cause for late-filed financial amendment and failure to demonstrate reasonable assurance, on the merits, that sufficient financial resources would be available. Substantial comparative demerit assessed for lack of candor in setting forth proposed financial resources, and *prima facie* basis for remand on additional financial misrepresentation issue noted.
–*Coastal Bend Family TV, Inc.*
BC Docket No. 80–460

FCC 83R–46

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| COASTAL BEND FAMILY TELEVISION, INC.<br>Corpus Christi, Texas | BC Docket No. 80–460<br>File No. BPCT-790507KE |
| CHRISTIAN CHILDRENS NETWORK, INC.<br>Corpus Christi, Texas | BC Docket No. 80–461<br>File No. BPCT-791026KI |
| For Construction Permit | |

*Appearances*

*B. Jay Baraff, Aaron Shainis,* and *Lee J. Peltzman,* on behalf of Coastal Bend Family Television, Inc.; and *Leonard K. Buntrock, pro se,* on behalf of Christian Childrens Network, Inc.

DECISION

(Adopted: June 9, 1983; Released: (June 24, 1983.)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of Coastal Bend Family Television, Inc. (Coastal) and Christian Childrens Network, Inc. (Christian) for authority to construct a new commercial television station to operate on Channel 38 at Corpus Christi, Texas. By Hearing Designation Order, Mimeo No. 35947, 45 Fed. Reg. 65306, published October 2, 1980, the applications were

designated for hearing on a limited financial issue against Coastal and on the standard comparative issue. The financial issue was resolved favorably to Coastal in Memorandum Opinion and Order, FCC 80M-616, released December 18, 1980; however, by Memorandum Opinion and Order, FCC 81M-616, released March 3, 1981, a public file issue was added against Coastal by presiding Administrative Law Judge Tierney (ALJ), and by Order, FCC 81M-938, released April 1, 1981, and Memorandum Opinion and Order, FCC 81M-2865, released September 10, 1981, respectively, a limited financial issue and a misrepresentation and/or lack of candor issue were added against Christian.

2. The Initial Decision (I.D.), FCC 83D-3, released January 24, 1983, granted Christian's application. In reaching this result, the ALJ found Christian to be financially qualified and awarded it a substantial preference under the comparative criterion of diversification of control of the media of mass communications. He concluded that this preference outweighed whatever preference Coastal deserved under the integration of ownership and management criterion, especially when a slight comparative demerit against Coastal on the public file issue was factored in I.D., para. 59. The proceeding is now before the Review Board on exceptions filed by Coastal and a reply brief by Christian. In addition, Coastal has requested oral argument, which Christian opposes, and Christian has filed a petition for leave to amend its financial showing (April 7, 1983), which Coastal opposes. The Board has reviewed the I.D. in light of these exceptions, briefs, and other pleadings and our examination of the record. We agree with Christian that oral argument is unnecessary to further elucidate the relevant facts and points of law in this case, and we will accordingly deny Coastal's request for oral argument. *E,g., Brownfield Broadcasting Corp.*, 93 FCC 2d 1197, 53 RR 2d 1175 (Rev. Bd. 1983). Christian's petition for leave to amend will be granted to the extent indicated in paragraph 8, *infra*. We adopt the findings of fact in the I.D., except as modified herein, but disagree with the ALJ's ultimate conclusion and conclude that grant of Coastal's application will better serve the public interest, convenience, and necessity.

3. *Financial Qualifications of Christian.* At the time of hearing designation, Christian's basic financial qualifications appeared to be in order, and no financial issue was designated against it. Christian was relying on a financial plan set forth in a timely August 11, 1980 amendment to its application whereby the proposed $288,027 cost of constructing its new station and operating it for three months was to be met by the anticipated $891,500 net proceeds from the sale of "37 acres of prime real estate in downtown Corpus Christi" that "Applicant presently holds." See Coastal's November 3, 1980 petition to enlarge issues, at Exh. 4. By letter dated September 8, 1980 and filed on September 10, 1980 as part of a petition for leave to amend,

the then president of Christian, Reverend Willie Lee, Jr., informed the Commission that Christian did not hold legal title to the 37 acres in question, and requested that Christian's application be amended to delete all references to the property and to Christian's reliance on proceeds from its proposed sale as evidence of its financial qualifications. Coastal Exh. 4, at 1.[1] Recognizing the fatal impact of this amendment on its financial plan, Reverend Lee added: ". . . CCN[Christian] concedes that it is financially unqualified at this point. We are working hard to put the land transaction together and to generate other sources of financing as well." *Id.*, at 2.

4. It was in light of this revelation that Coastal petitioned to add financial qualifications and financial misrepresentation issues against Christian. In FCC 81M-938, *supra*, the ALJ added a "limited" financial issue, but declined to add any misrepresentation issue, pointing out that Christian had come forward, on its own and prior to Coastal's petition, to admit its "error" respecting ownership of the 37 acres, and that this admission belied any previous intent to misrepresent. According to Reverend Lee's September 8, 1980 letter, *supra*, Christian confused its leasehold interest in the land with legal title because all that was lacking was the giving of notice of the exercise of Christian's option to purchase and because Christian had "habitually" thought of the land as "our land."[2] Moreover, Reverend Lee explained, when Christian filed its application on October 26, 1979, it "intended momentarily" to exercise its option to purchase but the "necessary financing could not be immediately generated." *Id.*, at 2. Coastal excepts to the ALJ's failure to add the requested misrepresentation issue.

5. We have previously expressed our concern in *WHW Enterprises, Inc.*, 89 FCC 2d 799, 807–808, 51 RR 2d 409, 415 (Rev. Bd. 1982), that assets claimed by an applicant in its financial statements must be accompanied by accurate and full disclosure of "unapparent interests in other parties." In the instant case, not only did Christian's financial plan create the "inaccurate impression" (Reverend Lee's words) that it owned an asset which it was only renting, but Christian's "inaccuracy" was aggravated by its accompanying October 20, 1979 *pro forma* balance sheet (Form 301, Exh. III-3, official notice taken), which listed the 37 acres as an asset encumbered with an (apparently phantom) $600,000 mortgage as a liability. Coastal's November 3, 1980 petition to enlarge contained allegations

[1] The amendment was received at the Commission midway between the Hearing Designation Order's adoption on August 28, 1980 and its release on September 19, 1980. Following its refiling on February 5, 1981 as a result of discussion at a November 20, 1980 prehearing conference (Tr. 17), the ALJ accepted the amendment by Order, FCC 81M-536, released February 26, 1981.

[2] See Christian's October 19, 1979 "Lease Agreement with Option to Purchase" covering the land, which was an attachment to Christian's February 5, 1981 petition for leave to amend.

and a supporting affidavit challenging Christian's legal title, nonexistent mortgage, and option to purchase the 37 acres. We believe that these allegations and accompanying documentation presented a strong *prima facie* showing of deception sufficient to mandate the addition of a misrepresentation issue. *See Alabama Citizens for Responsive Public Television, Inc.*, 73 FCC 2d 615, 46 RR 2d 408 (1979). The necessary ingredient of a motive to deceive, *Western Connecticut Broadcasting Co.*, 47 FCC 2d 145, 30 RR 2d 453 (Rev. Bd. 1974), was also clearly present: without having alleged ownership and proposed sale of the 37 acres, Christian would have had absolutely no source of financing for its proposed station and its application would have been dismissed as patently defective. *See generally* Section 73.3566 (Defective Applications) of the Commission's Rules, 47 CFR 73.3566.[3] And we reject the notion that the retraction of apparent misrepresentations prior to detection proves lack of intent to deceive or otherwise obviates the need to examine such conduct at hearing. While Christian would have us believe that it intended its financial plan to be only "momentarily" inaccurate (see paragraph 4, *supra*), the inaccuracies were far from trivial, Christian permitted 11 months to pass before notifying the Commission of its misstatements, and other exculpatory arguments offered by Christian contradict its limp attempt at mitigation.[4] Thus, the Board concludes that a financial misrepresentation issue should have been added against Christian. But for the fact that Christian's application is being denied on other grounds, we would remand this proceeding for exploration of the effect of Christian's conduct on its basic or comparative qualifications. If proved, the alleged misrepresentations by Christian would merit heavy sanction. We again admonish all applicants to be precise, complete, and prompt in their filings with the Commission. "[W]here qualification of a representa-

[3] The Commission recently emphasized the appropriateness of adding a financial issue where there is *prima facie* evidence of "misrepresentation or gross omission of an item which would render a proposal totally defective." *Muncie Broadcasting Corp.*, FCC 83–234, released May 19, 1983, at para. 15. Such evidence was glaringly present here.

[4] For example, at a remand hearing Christian would have to reconcile its September 8, 1980 contention that it meant to exercise its option to purchase the 37 acres as soon after October 1979 as the "necessary financing could . . . be . . . generated" (see paragraph 4, *supra* ) with its statement in a May 18, 1981 supplement to petition for leave to amend, at 5, that Christian had "de-emphasized efforts to gain financial support to build and operate its proposed facility [beginning] in October 1979." This statement was in turn contradicted by a May 26, 1981 "erratum" which asserted, at 2, that "Since the date that its application was filed . . . CCN has diligently solicited financial support . . . ." Inquiry would also be necessary to reconcile language in Christian's lease agreement, at 2, describing the "express purpose" of the lease as being to study the feasibility of using the 37 acres for "the construction, maintenance and operation of a broadcasting facility," with Christian's contention 7 days later in its broadcast application that it would sell all of the land to finance its proposed station.

tion is necessary for complete accuracy, it is better to be safe than sorry." *WHW Enterprises, Inc., supra*, 89 FCC 2d at 808, 51 RR 2d at 415.

6. Turning to the limited financial issue that the ALJ did designate, we note that Christian did not oppose addition of the issue and did not file any proposed curative financial amendment prior to commencement of the hearing on May 12, 1981. Nor did Christian exchange any hearing exhibits pertaining to its financial qualifications on the April 14, 1981 exhibit exchange date. Nevertheless, on the first day of hearing (May 12, 1981), Christian filed a petition for leave to amend its application, along with a revised financial plan which listed construction and initial operation costs of $206,827 and proposed resources of $1,411,256 (corrected to $1,431,256 by Christian's May 18, 1981 supplement). That petition was briefly discussed by the ALJ and counsel at the hearing sessions on May 13 and 14 (Tr. 236–247, 452–455), but it is evident from the record that no one, including Christian's counsel, envisioned that any testimony would be taken on this matter at that time. Indeed, Christian's counsel requested and received the ALJ's permission to supplement its petition for leave to amend "on the first working day *after we have finished here*" (Tr. 453, emphasis added). Coastal and the then Broadcast Bureau opposed Christian's amendment on May 26, 1981 on grounds that the pleadings failed to demonstrate Christian's financial qualifications on the merits and, procedurally, did not meet the established six-point test of good cause for postdesignation amendments set forth in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (Rev. Bd. 1970):

> . . . the moving party must demonstrate that it acted with due diligence; that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage.

Based on these objections, the ALJ orally denied Christian's petition at a hearing conference on July 22, 1981 (Tr. 719) for failure to demonstrate good cause and memorialized that ruling in FCC 81M-2865, *supra*. Eleven months later, in its August 12, 1982 reply findings of fact and conclusions of law, at 6–7, Christian requested reconsideration of the ruling, and in paragraphs 49 and 50 of the I.D., the ALJ granted reconsideration, applied "relaxed" good cause criteria to accept the proffered financial amendment, and concluded that Christian was financially qualified based on its amended finances.

7. Coastal excepts to the ALJ's conclusion that Christian is financially qualified, renewing its previously successful arguments that Christian's amendment was not submitted with due diligence; that Christian's financial predicament and its need for an amend-

ment were voluntary; that acceptance of Christian's 28% reduced cost estimates would require modification of the existing hearing issues; and that acceptance of the amendment would disrupt the orderly conduct of the proceeding. On the merits, Coastal urges that Christian has not adequately shown that its proposed non-institutional lenders of $295,000—Messrs. William Reiff ($220,000) and John Stembridge ($75,000)—have sufficient net current liquid assets to meet their loan commitments, and that Christian has utterly failed to show that it will have available $1,086,256 in prepaid program revenues from Roloff Evangelistic Enterprises, Inc. In reply, Christian asserts that acceptance of its late amendment is dictated by the "choice among applicants" concerns of *Azalea Corp.*, 31 FCC 2d 561, 22 RR 2d 909 (1971), and *Crosthwait :fo v. FCC*, 584 F. 2d 550 (D.C. Cir. 1978). It contends that it had been diligently seeking to develop its finances since October 1979 and, most particularly, since September 1980, but that its revised financing package was not completed until May 12, 1981. Finally, Christian urges that it should be treated as a "preferred" applicant because it has substantial minority ownership,[5] and that it had reasonable assurance that the Roloff funds would be available.[6]

8. On April 7, 1983, Christian filed yet a further petition for leave to amend its finances, this time in light of the withdrawal of a $50,000 line of credit which was to have been made available by Christian Television Services, Inc. In its place, Christian proposes to increase William Reiff's loan commitment to $270,000 and includes an updated December 31, 1982 balance sheet for Reiff. The amendment also deletes Roloff Evangelistic Enterprises as a financing source. Coastal opposes acceptance of the amendment other than for purely advisory purposes (pursuant to Section 1.65 of the Rules, 47 CFR 1.65). We will grant Christian's petition and accept its 1983 amendment as a supplement to its May 12 and 18, 1981 financial amendments so that only a single good cause determination need be made and we can, if procedurally appropriate, consider the merits of Christian's latest full financial plan.

9. We agree with Coastal that Christian has not shown good cause for the submission of its May 1981 financial amendments eight months after September 1980, when it first conceded that it was financially unqualified (see paragraph 3, *supra*), and 19 months after

[5] Because two of Christian's seven directors are Hispanic and will be integrated into the proposed station's operations in managerial roles, Christian is deemed to have 28.6% minority "ownership" in its non-profit, non-stock corporation.

[6] As to the liquidity of Messrs. Reiff and Stembridge, Christian seems to concede at page 10 of its reply brief that they are not sufficiently liquid, but asserts that neither were Coastal's sources of financing. Christian asks to be measured by the same standard. To the extent that the ALJ found Coastal's financing sources to be insufficiently liquid in Memorandum Opinion and Order, FCC 80M-2671, released December 18, 1980, he reduced their loan commitments accordingly. The liquidity of Christian's sources will be similarly treated. See paragraphs 11–12, *infra*.

it should have been aware that its finances were shaky in October 1979 (see paragraphs 3–5, *supra*).[7] Neither *Azalea* nor *Crosthwait* compels the Commission to accept curative amendments to preserve a comparative choice, *regardless of the presence or absence of good cause for late amendments. Cf. California Broadcasting Corp.*, 90 FCC 2d 800, 808, 51 RR 2d 1539, 1545 (1982) (the fact that an environmental issue is potentially disqualifying does not "entirely relieve" applicant of good cause showing). Indeed, *Crosthwait* expressly recognizes that the Commission "could properly haved snubbed" a belated attempt to repair a defective showing made at a hearing and not otherwise attended by good cause. 584 F.2d at 555. We have such a case here. Faced with a disqualifying financial issue, Christian had the burden of proof of demonstrating its financial qualifications at (or before) hearing. But it filed no advance pleadings or exhibits on this matter and introduced no documentary or testimonial evidence at hearing. Instead, it merely tendered a proposed financial amendment at the 12th hour (May 12, 1981), with no reasonable expectation or prospect that the merits of the amendment would be considered until sometime after the hearing ended. See paragraph 6, *supra*. While Christian contends that its proposal was not ready any earlier, it had between 8 and 19 months to firm up its finances prior to hearing, and it has not factually explained why it was unable to do so. Moreover, Christian's failure to exchange or introduce any evidence before or at hearing distinguishes this case from *Gilbert Broadcasting Corp.*, 68 FCC 2d 186, 43 RR 2d 51 (Rev. Bd. 1978), cited by Christian, in which the Board held that a revised financial proposal exchanged *on the hearing exchange date* without an accompanying amendment should have been permitted to be relied upon to meet a disqualifying issue. Timely exchange by Christian on April 14, 1981 would have permitted Coastal and the Bureau to address Christian's financial amendment prior to, or at least at, hearing. Christian's contrary procedure was bound to disrupt the orderly conduct of this proceeding, and succeeded. Due diligence required more. *Cf. Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 53 RR 2d 1203, (Rev. Bd. 1983); *Pan American Broadcasting Co., Inc.*, 89 FCC 2d 167, 50 RR 2d 1546 (Rev. Bd. 1982).

10. More recently than *Azalea* and *Crosthwait*, the Commission held in *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 489, 49 RR 2d 1589,

[7] In calculating this period of apparent indolence, we pass over Christian's August 11, 1980 financial amendment because that document did not introduce any additional financial sources. Indeed, to the contrary, it implicitly reported the loss of a $350,000 line of credit from International Bank, Corpus Christi, Texas, which was described in Exhibit III-2 of Christian's October 1979 application (official notice taken) as being the subject of present negotiations to finalize the terms. No loan commitment letter was included in the exhibit, and all reference to this line of credit was deleted in the August 11, 1980 financial amendment without explanation.

1594 (1981), that where, as here, an applicant is attempting to cure a disqualifying financial defect, it need not show that a curative amendment was occasioned by an involuntary act, and its diligence should be interpreted in light of the equities of the case. The Board looks to both quantity and quality of effort in measuring the equities of due diligence, *Shoblom Broadcasting, Inc., supra,* at 1206 n. 6, but can find neither in Christian's lackadaisical performance in this proceeding. Moreover, unlike the ALJ in his reconsideration action, we do not read the Commission's adoption of an abbreviated financial certification requirement in *Revision of Form 301*, 50 RR 2d 381, 382 (1981), as signaling a relaxation of the *Erwin O'Conner* good cause test when an applicant's finances have been called into question by a specially designated hearing issue. *Cf. South Florida Broadcasting Co., Inc.*, FCC 83–265, released June 2, 1983, reversing a Mass Media Bureau procedure established in *Minority Broadcasters of East St. Louis, Inc.*, Mimeo No. 5092, released July 15, 1982, which would have permitted use of an abbreviated financial certification, instead of a full demonstration of financial qualifications, when finances were questioned in a hearing designation order. Finally, while it is well established that the Commission will accord comparative qualitative enhancement credit for the participation of minority owners in station management, *WPIX, Inc.*, 68 FCC 2d 381, 411–412, 43 RR 2d 278, 315–316 (1978), minority applicants must, of course, still meet basic qualifying issues. *Cf.South Florida Broadcasting Co., Inc., supra.* Hence, good cause not having been shown for Christian's erratic and questionable amendment efforts, we conclude that the subject amendments should not have been accepted by the ALJ. Christian is therefore lacking a cognizable financial proposal and, accordingly, is financially unqualified. Nevertheless, out of an abundance of caution, we shall also examine the merits of Christian's current financial plan on the off chance that our procedural rejection of Christian's financial qualifications efforts is in error.

11. Christian's latest financial plan, filed April 7, 1983, envisions that its projected construction and operation costs of $206,827 will be met by a $270,000 loan from Christian's secretary-treasurer, William R. Reiff, and a $75,000 loan from a Mr. John Stembridge of Corpus Christi, Texas, who is neither an officer nor director of Christian and is not further identified in the record. Mr. Reiff's December 31, 1982 balance sheet shows current liquid assets of $5,653; nonliquid assets of $975,240 (real estate) and $63,023 (miscellaneous); total liabilities of $402,190; and net worth of $641,726. Mr. Stembridge's May 12, 1981 balance sheet shows current liquid assets of $5000; nonliquid assets of $20,000 (unaged loans and accounts receivable), $222,000 (real estate), and $6800 (miscellaneous); total liabilities of $29,900; and net worth of $223,900. To satisfy his loan commitment, Mr. Stembridge proposes to mortgage or sell a $95,000 property in Hollywood, Florida, which already has a $20,000 mortgage against it.

However, neither Mr. Reiff nor Mr. Stembridge has supplied any evidence of the ready marketability or liquidity of their real estate assets, which is required by *Kaye-Smith Enterprises*, 90 FCC 2d 105, 109, 51 RR 2d 875, 879 (1982),[8] if they are to be relied on as funding sources, nor has Mr. Reiff even identified which ones of his 12 properties he would attempt to sell to meet his commitment.

12. While the Commission has long held that "ownership of nonliquid assets several times the value of the cash which such assets are relied upon to yield" provides reasonable assurance of the ability to secure the required funds, *International Broadcasting Co.*, 3 FCC 2d 449, 451, 7 RR 2d 302, 305 (1966); *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 706, 51 RR 2d 389, 391 (Rev. Bd. 1982); *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 53 RR 2d 953 (Rev. Bd. 1983), these cited cases the ratio between net worth and loan commitment has been exceedingly high: 54:1 in *International*; 16:1 in *Cornwall*; and 22:1 in *Cannon's Point*. In the instant case, Mr. Reiff's net worth/loan ratio is 2.4:1, and Mr. Stembridge's is 3:1. These ratios are dramatically less than what case precedent contemplates for the presumption of ready liquidity, and because the subject net worths are based almost exclusively on real estate, there is no evidence of marketability, and the properties lack adequate aprais-als,[9] we cannot conclude that either Mr. Reiff or Mr. Stembridge has provided reasonable assurance that he will be able to fulfill his loan commitment. *Kaye-Smith Enterprises, supra.* Hence, Christian has failed to meet its burden of demonstrating its financial qualifica-tions,[10] and we conclude that, on the merits, Christian is financially unqualified to be a Commission licensee. *See Revision of Form 301, supra*, at 382, where the Commission expressly held that its filing reforms were "not, in any way, modifying the underlying substantive financial criteria"; *cf. South Florida Broadcasting Co., Inc., supra.*

13. *Misrepresentation and/or Lack of Candor Issue.* In its May 12, 1981 proposed financial amendment, Christian included the following line item as a financial resource:

---

[8] *But see Rose Broadcasting Co.*, 68 FCC 2d 1242, 1246 n. 9, 43 RR 2d 1317, 1325 n. 9 (1978), which suggests that "no information other than a valid appraisal" is required. In this connection, see note 9, *infra.*

[9] Mr. Reiff is an employee of the Texas Real Estate Commission and has provided his own superficial appraisals of his real estate holdings. This type of self-serving and cursory documentation cannot be credited. While Mr. Stembridge has attempted to provide an independent appraisal, it too fails, since neither the credentials of the appraisor nor the basis for his appraisal is indicated. We cannot conclude that the proffered appraisals are "valid". *Rose Broadcasting Co., supra.*

[10] It should also be noted that Christian's April 5, 1983 balance sheet shows that its corporate liabilities exceed its assets by $47,180. See Christian's April 7, 1983 petition for leave to amend. This deficit does not appear to be reflected in Christian's financial plan and would have to be satisfied from any funds made available by Messrs. Reiff and Stembridge.

"4. Revenues from programming purchased by Lester Roloff in the amount of $1,086,256 (See Attachment III-2(E))." [Coastal Exh. 5, at 2.]

Attachment III-2(E) is a copy of an April 11, 1979 Time Sales Agreement between Coastal and Roloff Evangelistic Enterprises, Inc., in which Roloff undertakes to prepay $1,086,256 to Coastal for broadcast time on Coastal's station upon issuance of a construction permit to Coastal. Neither Christian's May 12 amendment nor its May 18, 1981 supplement contained any explanation of the relationship between Christian's proposed reliance on the Roloff revenues and the contract between Coastal and Roloff (which contract nowhere references Christian). In a petition to reopen the record and enlarge the issues, filed on May 27, 1981, Coastal submitted an affidavit from Reverend Lester Roloff dated May 15, 1981 (Coastal Exh. 7), in which Reverend Roloff averred that between April 15 and May 8, 1981 he was contacted by Christian's Reverend Lee about entering into a similar time sales agreement with Christian and that Reverend Roloff refused "in no uncertain terms".[11] Because Christian's financial amendments were silent about this rejection by Reverend Roloff, Coastal requested a misrepresentation and/or lack of candor issue against Christian. Christian opposed the issue on the grounds that it had never actually "represented" that it had an agreement with Roloff, that Christian is financially qualified even without relying on the proceeds from a Roloff agreement, and that its "good faith inclusion" of the Roloff contract was based on advice of counsel. Counsel maintained that a "presumption" was appropriate that Roloff would enter into a similar contract with Christian (if Coastal did not receive the station license) in light of *George E. Cameron, Jr. Communications*, 71 FCC 2d 460, 45 RR 2d 689 (1979), where the Commission conclusively presumed that a renewal applicant's transmitter site would be available to a successful challenger. Christian's June 11, 1981 Opposition, at 2–6. The ALJ orally granted Coastal's petition in part (Tr. 729) at his July 22, 1981 hearing conference, added the subject misrepresentation/candor issue as a basic qualifying issue, and memoralized that ruling in FCC 81M-2865, *supra*.

14. The ALJ conducted a "paper hearing" on this matter, Order, FCC 82M-1029, released April 2, 1982, and made two key findings in the I.D.: (1) "the prospect of the sizeable Roloff revenue expected was far less than real" (para. 34); and (2) "The listing of expected revenues to be purchased by Lester Roloff . . . is far less worthy of

[11] By affidavit dated January 20, 1982, Reverend Roloff subsequently informed the Commission that this conversation may have been with William Reiff, rather than Reverend Lee, and may not have taken place between April 15 and May 8, 1981. "However, the substance of the conversation . . . remains the same." Affidavit attached to Coastal's January 27, 1982 Correction to Affidavit, at 1. Reiff separately confirmed by affidavit that he had conversed with Reverend Roloff in this vein in January 1981. Coastal Exh. 9.

reasonable assurance; indeed, it would appear highly presumptuous, if not a total myth." (para. 50). However, no explicit legal conclusions were drawn therefrom. Coastal excepts to this omission, urging the Board to conclude that Christian's adversions to alleged revenue from Reverend Roloff amounted to a "total fabrication" and a disqualifying misrepresentation.

15. Because this misrepresentation issue against Christian was added on a qualifying basis, it is clear, by implication, that the ALJ concluded that Christian should not be disqualified; only basically qualified applicants are entitled to comparative consideration, and Christian's application was comparatively considered. I.D., paras. 51–63. However, more must be said about Christian's financial representations. In our view, the ALJ too charitably couched his findings in the terminology of financial qualifications—whether Christian had "reasonable assurance" of the Roloff revenues—instead of using the terminology of misrepresentation and lack of candor.

16. While misrepresentation connotes "a false statement of an objective fact intentionally made to deceive," the core of lack of candor is "omission . . . failure to be completely forthcoming in the provision of information which could illuminate a decisional matter." *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1135, 1137, 50 RR 2d 1321, 1324, 1325 (Rev. Bd. 1982), *modified*, 53 RR 2d 44 (1983). We conclude that Christian's presumptuous listing of the Roloff revenues as its own *million dollar* financial resource, without any explanatory qualification, demonstrated a serious lack of candor bordering on misrepresentation, especially when coupled with Christian's failure to report that Reverend Roloff had *specifically disavowed* any intention of entering into a time sales contract with it.[12] Christian's fanciful interpretation of *Cameron* as a justification for its "reasonable assurance" of the Roloff revenues is without support in Commission precedent. Indeed, this *Cameron* interpretation was not even offered as a "good faith" explanation of Christian's representation until after Coastal challenged Christian's financial plan. It is disingenuous for Christian to argue that it never formally "represented" that it had an agreement with Roloff; while this may be technically true, it begs the question what representation *was* intended when it deliberately listed the Roloff revenues in its

[12] *Cf. Valley FM Radio*, 53 RR 2d 1195 (Rev. Bd. 1983), where the Board recently remanded a proceeding on site availability, lack of candor, misrepresentation, and failure to report issues where an applicant relied on a site even though he had received letters from the site's owner saying that the site was not available. Despite these letters, the applicant remained "confident" that the site would be available. *Accord, Shoblom Broadcasting, Inc., supra*, at n. 4, in which the Board observed that National Park Service letters refusing use of a specified site by an applicant vitiated the applicant's reasonable asurance that the site would be available.

financial plan and attached a Roloff-Coastal contract. There is manifestly an element of hocus-pocus in such conduct. And Christian's assertion that it would have been financially qualified even without the Roloff revenues (but see paragraph 12, *supra* ), is irrelevant; even useless deceptions may prove a desire to deceive, where, as here, an obvious motive to deceive exists (viz., to counter a financial issue). *See Scott and Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1100, 50 RR 2d 1251, 1258–59 (Rev. Bd. 1982), interpreting *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946).

17. The sole remaining question is the proper degree of sanction for Christian's lack of candor. We believe that a substantial comparative demerit is warranted, but not outright disqualification. In mitigation of the ultimate sanction of disqualification, a sanction which is appropriate where a "willful intent to deceive" is discerned, *Fox River Broadcasting, Inc.*, *supra*, 88 FCC 2d at 1137, 50 RR 2d at 1325, we note the ALJ's observations that Christian's application has been poorly prosecuted over an extended period of time, with several unexplained removals or withdrawals of counsel and much *pro se* representation. I.D., para. 62. While Christian was duly cautioned that it would be held to the Commission's rules and policies, *see, e.g.*, Memorandum Opinion and Order, FCC 81M-616, released March 3, 1981, at n. 1, our examination of this record reveals so many blunders and miscues that they cast doubt on the willfullness of Christian's intent to deceive. In this case, the distinction between willful and clumsy lack of candor is sufficiently blurred to justify the slightly lesser sanction of a substantial demerit.[13] *Cf. Country Broadcasting Co.*, 93 FCC 2d 83, 53 RR 2d 293 (Rev.Bd. 1983) (applicant disqualified because of pattern of intentional deception).

18. *Summation.* All exceptions having decisional signficance having been considered by the Board, we conclude that Christian is financially unqualified to be a Commission licensee and that its application must therefore be denied. But for this conclusion, a remand of this proceeding for the addition and exploration of a financial misrepresentation issue against Christian (see paragraphs 3–5, *supra*) would be mandatory. Finding that Coastal is qualified to be a licensee, we further conclude that a grant of Coastal's application will serve the public interest, convenience, and necessity.[14]

---

[13] Inasmuch as Christian's lack of candor appeared beyond dispute from the documentary evidence, the ALJ's conduct of a paper hearing on this issue was permissible. *See Hudson C. Millar, Jr.* v. *FCC*, No. 77–2040 (D.C. Cir., May 20, 1983), slip op. at 17–19. In any event, the exceptions do not challenge this procedure.

[14] The Board would reach the same result even if Christian had been found to be financially qualified and not subject to remand on a financial misrepresentation issue. In reviewing the ALJ's comparative conclusions, we agree that the applicants are essentially equal on the comparative integration criterion. See

19. ACCORDINGLY, IT IS ORDERED, That the request for oral argument filed by Coastal Bend Family Television, Inc. on March 28, 1983 IS DENIED;

20. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Christian Childrens Network, Inc. on April 7, 1983 IS GRANTED to the extent indicated in paragraph 8, *supra*;

21. IT IS FURTHER ORDERED, That the motion to strike filed by Coastal Bend Family Television, Inc. on April 19, 1983 IS DENIED, and the motion to accept late filed pleading and opposition to motion to strike filed by Christian Childrens Network, Inc. on April 25, 1983 IS GRANTED; and

22. IT IS FURTHER ORDERED, That the application of Coastal Bend Family Television, Inc. (File No. BPCT-790507KE) for a construction permit to establish a new television station at Corpus Christi, Texas IS GRANTED, and the application of Christian Childrens Network, Inc. (File No. 791026KI) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

---

I.D., para. 59. However, Christian would only be entitled to a slight diversification preference based on the 49% imputed interest of Coastal in three AM stations in Winston-Salem, North Carolina, Chattanooga, Tennessee, and Mobil, Alabama—all hundreds of miles away from Corpus Christi, Texas—rather than the substantial preference that the ALJ awarded (I.D., para. 54). *Cf. Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046, 51 RR 2d 1604 (Rev. Bd.), *recon. denied*, 52 RR 2d 1357 (Rev. Bd. 1982); *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 50 RR 2d 1142 (Rev. Bd. 1982). We believe that even with Coastal's slight comparative demerit on the public file issue (which it has not appealed), Coastal is comparatively superior to Christian, whose substantial comparative demerit for lack of candor (see paragraph 17, *supra*) vitiates its slight diversification preference and overcomes Coastal's slight public file demerit. *Cf. CJL Broadcasting, Inc.*, 88 FCC 2d 750, 50 RR 2d 1159 (Rev. Bd. 1981).

FCC 83D–3

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| COASTAL BEND FAMILY TELEVISION, INC.<br>Corpus Christi, Texas | BC Docket No. 80–460<br>File No. BPCT-790507KE |
| CHRISTIAN CHILDRENS NETWORK, INC.<br>Corpus Christi, Texas | BC Docket No. 80–461<br>File No. BPCT-791026KI |
| For Construction Permit | |

*Appearances*

Aaron Shainis, B.J. Baraff and James A. Koerner, Esqs. (Baraff, Koerner, Olender & Hochberg, P.C.) on behalf of Coastal Bend Family Television, Inc.; (Joseph E. Dunne, III, and James A. Gammon, Esqs. (Gammon and Grange), Stuart B. Mitchell, Esq., Bruce Navarro, Esq., earlier counsel since withdrawn or resigned, The Reverend Willie Lee, also withdrawn) Leonard K. Buntrock, *pro se*, on behalf of Christian Childrens Network, Inc.; and William D. Freedman and Allan Moskowitz, Esqs., on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

(Issued: January 17, 1983; Released: January 24, 1983)

*Preliminary Statement*

1. *Designation Order*, 45 Fed. Reg. 65306, published October 2, 1980, specified the following issues in this proceeding:

1. To determine with respect to Coastal Bend Family Television, Inc. (Coastal):

(a) the source and availability of additional funds over and above the $5,000.00 indicated; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

2. By *Memorandum Opinion and Order*, FCC 80M-2671, released December 18, 1980, the financial issue specified in the *Designation Order* was resolved favorably to Coastal.

3. By *Memorandum Opinion and Order*, FCC 81M-616, released March 3, 1981, the Presiding Judge added the following issues with respect to Coastal:

> (c) whether Coastal has adequately consulted with leaders of women and blacks in its proposed community of license;
>
> (d) the effect of the evidence adduced under the limited issue on the basic or comparative qualifications of applicant Coastal.
>
> (e) to determine whether applicant Coastal has failed to consistently maintain a public file in its proposed city of license as required by Commission rules, and, particularly:
>
> (1) whether applicant Coastal has harassed or intimidated members of the public attempting to inspect the public file;
>
> (2) whether the applicant has demanded an unreasonable price for copying documents contained in its public file in contravention to Rule 73.3526;
>
> (3) the effect of the evidence adduced under this issue and its subparts on the basic or comparative qualifications of the applicant Coastal.

4. By *Order*, FCC 81M-938, released April 1, 1981, the Presiding Judge added the following issue with respect to Christian Childrens Network, Inc. (CCN):

> 1. To determine, in light of reported and current conditions, whether Christian Childrens Network, Inc. (CCN) is financially qualified to effect its proposal and, premised on the evidence adduced thereunder, whether CCN is basically qualified to be an applicant.

5. By *Memorandum Opinion and Order*, FCC 81M-1514, released May 14, 1981, the ascertainment issue (added in *Memorandum Opinion and Order*, FCC 81M-616, released March 3, 1981) was resolved favorably to Coastal.

6. By *Memorandum Opinion and Order*, FCC 81M-2865, released September 10, 1981, the Presiding Judge added a misrepresentation issue against CCN, to wit:

> 2. To determine whether Christian Childrens Network, Inc., misrepresented and/or lacked candor as to its reliance on pre-paid advertising commitments from Roloff Evangelistic Enterprises;
>
> 3. To determine in light of the evidence adduced pursuant to the foregoing issue, whether CCN has the requisite qualifications to be a Commission licensee.

7. Prehearing conferences were held on November 20, 1980, and January 30, 1981. Hearing sessions were held on May 12, 13, 14 and 15, 1981. A post-hearing conference was held on July 22, 1981. The record was originally closed May 15, 1981; reopened and closed, June 2, 1981; reopened at conference, July 22, 1981; and, finally, closed by *Order*, FCC 82M-1945, released June 18, 1982.

8. The parties applicant timely filed proposed findings, conclusions and replies. Counsel for the Chief, Broadcast Bureau participated in prehearing, hearing and post-hearing phases, but for otherwise valid reasons did not file proposed findings and conclusions.

9. The several counsel listed as appearing for CCN participated from time to time as changes or withdrawals occurred. Leonard K. Buntrock, who was the final counsel of record, is an officer of CCN.

10. Because of the patent inadequacy of the parties' original proposed findings of fact, especially those of CCN, the parties, particularly CCN, were directed to prepare and file appropriate submissions in conformity with the established Rules of Practice and Procedure. (*See Order*, FCC 82M-2594, released August 25, 1982; Rule 1.264 (47 CFR 1.264).) In a somewhat perplexing manner, CCN reported that that *Order* failed to reach what it termed the proper addressee. By further *Order*, FCC 82M-3090, released October 6, 1982, CCN was given an additional grace period of 30 calendar days within which to properly respond. Coastal was also extended the privilege to reply to those expected filings, Coastal having filed timely Supplemental Findings, as directed.

11. Finally, CCN on November 5, 1982, filed Revised Proposed Findings of Fact and Conclusions of Law signed by its Vice President, Leonard K. Buntrock. Coastal filed its Reply to Revised Proposed Findings on November 22, 1982, and continued its earlier urging for dismissal of CCN's application. Though government counsel on behalf of the Chief, Broadcast Bureau (now Mass Media Bureau) participated throughout the hearing sessions, for reasons of personnel austerity, the customary and generally helpful contributions of proposed findings and conclusions were not available here.

12. For the reasons set forth hereinafter, this, as an Initial Decision SHALL GRANT the application of Christian Childrens Network, Inc.; that being so, the application of Coastal Bend Family Television, Inc., IS DENIED.

## *Findings of Fact*

### *Public File Issue*

13. In specifying the issue, questions were raised concerning whether: (a) Coastal's public file was unavailable for a period of time, (b) members of the public were charged excessive fees to copy portions of Coastal's public file, and (c) Coastal attempted to "harass and intimidate" persons who sought to use its file.

14. At the time Coastal filed its application on May 7, 1979, its public file was located at 3833 South Staples, Suite 46, Corpus Christi, Texas (Bureau Ex. 5, p. 3). This was the address of the Professional Advertising Agency which was owned by William M. Jeffers (Coastal Ex. 3, p. 1). In the later part of August 1979, when

the file was located at this location, Reverend Willie Lee, CCN's then President, went to look at Coastal's public file (Tr. 163).[1] Mr. Jeffers did not ask Reverend Lee to identify himself and did not ask for what purpose he was looking at the file (Tr. 165). Reverend Lee asked Mr. Jeffers if he was intruding and Mr. Jeffers responded that he was not (Tr. 167). Reverend Lee stayed to look at the file for approximately 10 to 15 minutes (Tr. 171). Reverend Lee's purpose in looking at the application was to get a greater sense of what a finished application was to look like so as to enable him to prepare CCN's application (Tr. 177). Sometime in October 1979, Mr. Jeffers moved his offices and, thus, Coastal's public file was relocated to his new offices at Suite 501, 101 North Shore Line, Corpus Christi, Texas. Information was left at the South Staples address as to where Coastal's public file was located. This was done by a card being placed in the window (Coastal Ex. 3, p. 1). In December 1979, after the public file had been relocated, Reverend Lee went to inspect the file again. He wanted to see if any amendments had been filed (Tr. 178). When he received the file, Reverend Lee and his communications counsel examined the file (Tr. 194).

15. In January 1980, Mr. Jeffers moved to Knoxville, Tennessee, and took Coastal's public file with him (Coastal Ex. 3, p. 1).

16. In August 1980, Reverend Lee attemped to view Coastal's public file (Tr. 203). The purpose of this visit was to see if Coastal had amended its application prior to the "B" cut-off date (Tr. 203–204). Mr. Jeffers would have it that the relocation of the public file to Knoxville would be only a temporary measure until he could make more permanent arrangements for the file in Corpus Christi. However, he forgot about the file (Coastal Ex. 3, p. 1).

17. In August 1980, during a conversation with William Kitchen, Mr. Jeffers remembered that Coastal's public file had not been forwarded back to Corpus Christi. In August 1980, Coastal's public file was forwarded to the office of Harry Dobbs in Corpus Christi. Mr. Jeffers overlooked the republication requirement (Coastal Ex. 3, p. 2).

18. Mr. Kitchen and Mr. Jeffers were long time friends. They attended college together and worked together at CLW Broadcasters, Inc., in Chattanooga (Tr. 286). Mr. Kitchen's company, Quality Media Corporation, does broadcast consulting work. Due to his friendship with Mr. Jeffers, Mr. Kitchen advised Mr. Jeffers with respect to various matters involving Coastal's application (Tr. 287). Prior to the time he became a stockholder in Coastal, Mr. Kitchen

[1] Reverend Lee said that when he went to Mr. Jeffers' office to view the public file he was greeted by a secretary and informed that the application was located there. Mr. Jeffers came out and invited Reverend Lee into his office to look at the file (Tr. 164). Reverend Lee claimed that his reason for looking at the file was to get a feel for what a completed application looked like (Tr. 164–165). Reverend Lee acknowledged that he was treated in a friendly manner (Tr. 248).

spoke with Mr. Jeffers about the public file. This conversation took place in July or August of 1980 (Tr. 288). He reminded Mr. Jeffers of the obligation of Coastal to keep a public file available for public inspection in Corpus Christi (Tr. 288). Mr. Jeffers informed Mr. Kitchen that he had forgotten about the file after having brought it to Knoxville. Mr. Kitchen advised Mr. Jeffers to Express Mail the file to him for review by Quality Media Corporation's staff. It would then be mailed to Corpus Christi for maintenance at the office of Harry Dobbs, an attorney (Tr. 290).

19. During the period when Coastal's public file was either located at the South Staples or North Shore Line locations, the only individuals who ever requested to see it were Ms. Mary Louise Pena, a director of CCN (CCN Ex. 1, p. 1), and Reverend Lee (Coastal Ex. 3, p. 2).

20. Around the time Coastal filed its application, Mr. Jeffers had a conversation with Robert Jensen[2] concerning the public file and the logistics involved in providing copies of it to members of the public, if requested. Having had experience with other applications, Jensen knew that there was a requirement for the maintenance of a public file in Corpus Christi (Tr.306).

21. Mr. Jeffers expressed his concern that any large scale copying would be a drain on his limited staff. It was understood that any member of the public was entitled to see the public file and physically copy information from it. During the course of the conversation, the amount of $2.00 per page was discussed (Coastal Ex. 3, p. 2). Mr. Jensen recalled that he had a brief discussion with Mr. Jeffers in his office, as to the specific policies to be followed by Coastal where members of the public wanted copies of the application (Tr. 309–310). Mr. Jensen recalls stating, as he would have it, in jest, that Mr. Jeffers could charge a couple of dollars a page (Tr. 312–314).[3]

22. This conversation was overheard by Mr. Jeffers' secretary, Ms. Janice Davis, who assumed that $2.00 per page was what was to be charged (Tr. 318). However, she was not instructed by any Coastal official to charge that amount (Coastal Ex. 3, p. 2).

23. When Mr. Jeffers was not in the office, Ms. Davis did charge Ms. Pena $47.00 for duplicating a portion of Coastal's application (Coastal Ex. 3, pp. 2–3). This occurred on October 22, 1979 (Bureau

[2] At the time Coastal's application was filed, Robert Jensen held the office of Executive Vice President and Secretary (Tr. 304). He does not currently have any ownership interest in Coastal, but did at the time Coastal's application was filed (Tr. 303–304). Mr. Jensen sold his interest in August or September 1980 (Tr. 304). (An amendment filed by Coastal and accepted by *Order*, FCC 82M-3743, released November 26, 1982, reported the death of Mr. Jensen.)

[3] At the time this conversation took place, Mr. Jeffers' receptionist was at her desk in the office adjacent to Mr. Jeffers' office. There was an open door between the two offices (Tr. 311).

Ex. 2). After the charge had been made, Mr. Jeffers encountered Ms. Pena in the parking lot. She complained to him about the amount she had been charged for the copies. Mr. Jeffers informed Ms. Pena that the amount she had been charged was a mistake and requested that she accompany him to his office so that he could make an adjustment. Ms. Pena, however, refused to allow Mr. Jeffers to make any adjustment (Coastal Ex. 3, p. 3).

24. Ms. Pena went to look at the Coastal public file as a result of a conversation she overheard between Reverend Lee and CCN's engineer a few days earlier (Tr. 406). She offered to obtain the engineering portion of Coastal's application to assist CCN (Tr. 408). She copied those portions of Coastal's application as she was directed by Reverend Lee and CCN's engineer (Tr. 424). She did not understand what she was copying (Tr. 479–480). She, however, was aware that CCN needed the information to meet a filing deadline (Tr. 480). When Ms. Pena came to Jeffers' office, she was asked to identify the organization she was with.[4]

25. Upon learning that Ms. Pena was affiliated with a competing applicant, Mr. Jeffers was concerned because she had copied Coastal's entire equipment proposal, which consisted of 24 pages. It appeared to him that CCN was merely going to be copying a portion of Coastal's application in order to meet the filing deadline which was only four days hence (Coastal Ex. 3, p. 3). Mr. Jeffers subsequently telephoned Ms. Pena at her mother's residence and indicated that what she had done appeared to be somewhat unethical.[5] The facts would suggest that Ms. Pena, nor anyone else, was ever discouraged from viewing Coastal's public file (Coastal Ex. 3, p. 3).

*Financial Issue*

26. In specifying the financial issue with respect to CCN, the following was noted:

> ". . . CCN by its September 10, 1980, amendment (not earlier acted upon but allowed to be resubmitted during prehearing, November 20, 1980) admitted error respecting ownership of certain real property and related financial information. CCN's resubmitted amendment filed, February 5, 1981, covered the areas in dispute. CCN's Petition was granted and its amendment accepted by *Order*, FCC 81M-536, released February 26, 1981. . . . CCN's no longer representing ownership of certain real property, poses the notion that CCN 'is financially unqualified at this point.' Hence a showing has been made to add a *limited* financial issue against CCN to inquire as to its ability to finance its proposal." See *Order*, FCC 81M-938, released April 1, 1981.

The burden of proceeding and the burden of proof were placed on CCN.

---

[4] Her response was that she was an individual wanting to see the application (Bureau Ex. 2).

[5] Ms. Pena confirmed that Mr. Jeffers was polite to her both on the phone and in his office (Tr. 485).

27. CCN failed to offer any evidence at the hearing with respect to its financial qualifications. CCN, at one point, admitted that it was not financially qualified. Specifically, CCN stated:

> "With the withdrawal of this land from our application, CCN concedes that it is financially unqualified at this point." (Coastal Ex. 4.)

28. CCN, in its Reply Findings, addresses that matter and cites the transcript of obiter language in a case seemingly misidentified:

> ". . . by the theory that if someone were to get a lucrative television facility . . . . there would be no problem in getting the necessary financing." CCN continues, "(2) If case law is supportive of CCN's use of the REE [Roloff Evangelistic Enterprises, Inc.] time-sales contract values perhaps it might be favorably found that CCN may be financially qualified as of the same moment as COASTAL on the same basis of the REE contract passing to the surviving applicant in a situation where there will be only one suitable station in the market place." (CCN's Reply Findings filed August 12, 1982, at p. 7.)

*Misrepresentation Issue*

29. The specification of the misrepresentation issue with respect to CCN, was predicated on CCN's representation in its May 12, 1981, amendment that it would have over one million dollars in revenue available from Roloff Evangelistic Enterprises. (*Memorandum Opinion and Order*, FCC 81M-2865, released September 10, 1981, at paragraph 9.)

30. By letter dated September 8, 1980, and filed with the Commission as part of an amendment to its application, as noted in para. 27, *supra*, CCN stated, *inter alia*, the following:[6]

> "With the withdrawal of this land from our application, CCN concedes that it is financially unqualified at this point." (Coastal Ex. 4.)

31. On May 12, 1981, and May 18, 1981, CCN sought to amend its application to reflect, *inter alia*, reliance on revenues from programming purchased by Lester Roloff. Specifically, CCN indicated as follows:

> "4. Revenues from programming purchased by Lester Roloff in the amount of $1,086,256 (See Attachment III-2(e))." (Coastal Exs. 5 and 6.)

32. Prior to these submissions, Mr. Roloff[7] was contacted by either Reverend Willie Lee or William Reiff of CCN. Mr. Roloff was asked if Roloff Evangelistic Enterprises would be willing to prepay to CCN the sum of $1,086,000 upon grant of a construction permit to it

[6] The letter was signed by CCN's then President, Reverend Willie Lee, Jr.

[7] Mr. Roloff is President of Roloff Evangelistic Enterprises, Inc. (Coastal Ex. 7.) It would seem common knowledge, certainly an object warranting Official Notice (*Cf.*, *Washington Post*, November 3, 1982, at p. B-6) that Lester Roloff and others suffered death in a tragic airplane accident at or near Normangee, Texas. Yet, for whatever reason, no one has seen fit or necessary to report that fact for this record.

by the FCC. Mr. Roloff informed the individual who contacted him that he would not be willing to enter into such an agreement with CCN. (Coastal Exs. 7 and 8.)

33. William Reiff confirmed that he spoke with Mr. Roloff concerning the possibility of negotiating a contract with CCN similar to the one which Roloff had with Coastal in the event CCN was awarded the broadcast franchise. Roloff's response, according to Reiff, was as follows:

> ". . . Brother Roloff replied that he did not feel he should talk to us and that any discussions in this vein should be had with Coastal Bend. He then went on to explain that he had made a commitment to Coastal Bend and to enter into a similar contract with us could be a violation of that commitment." (Coastal Ex. 9.)

34. But, CCN argues in its Revised Proposed Findings that absent or apart from the hoped for Roloff expected revenues, its newly submitted financial plan filed May 12, 1981, in the form of a proposed amendment (later rejected as principally untimely filed by *Memorandum Opinion and Order*, FCC 81M-2865, released September 10, 1981) indicated a first quarter operating budget of $206,827 supported by loan commitments from ". . . . Bill Reiff $220,000.00 [$200,000.00], Christian Television Services . . . $50,000.00, John Stembridge . . . $75,000.00." CCN's addition of the Roloff revenue of $1,086,000, it says was "not as a matter of deception, misrepresentation, nor lack of candor, but based on a reasonable supposition in a one-Christian Station market that the buyer of Christian Time programming will go to the station granted the construction permit." (CCN's Revised Proposed Findings at p. 10.) On this score, then, it can be and is found that the prospect of the sizeable Roloff revenue expected was far less than real.

*Comparative Issue*

35. CCN is a non-profit corporation operated by a board of trustees and appointed officers. Leonard Buntrock is Vice President and current Chief of Operations. William R. Reiff is secretary and currently operating as Treasurer. Mary Louise Pena and Beatrice Pena are members of the Board of Directors. None of these officers or directors have any ownership interest in or control in any medium of mass communications in Corpus Christi.

36. Leonard K. Buntrock, a graduate of Texas A&I University who served in the United States Army in Europe, is also President of Glory Alleluia, Inc., a religious organization. William R. Reiff is a field representative for the Texas Real Estate Commission and an independent investor in real estate. Mary Louise Pena is a personal secretary to a Nueces County Judge. Beatrice Pena is a clerk in the county assessor's office. Both the Penas are also Hispanic. Mr. Reiff is an attorney, "but not in practice." Mr. Buntrock also worked briefly for an advertising agency and for station KZTV in Corpus

Christi as a copy writer and time salesman. Mr. Buntrock worked as a supervisor in the Collection Department of the Credit Bureau of Corpus Christi for 10 years and was later employed by Mutual of New York as an insurance salesman for 13 years. For the last three years, he has been a full-time minister.

37. Coastal has no *direct* media interests; however, Beacon Broadcasting, Inc. (Beacon) is the licensee of WBFU, Winston-Salem, North Carolina; WMOC, Chattanooga, Tennessee; and WPCY, Mobile, Alabama. Beacon is in turn owned by Quality Media Corporation, a corporation controlled by William J. Kitchen, who was a 49 percent stockholder in Coastal. Kitchen's interest in Coastal was acquired by Beacon. (*See Order*, FCC 82M-0934, released March 23, 1982.) Beacon's broadcast interests are thus attributable to Coastal.

38. Coastal is a corporation having but two shareholders, originally William F. Jeffers and William J. Kitchen. Beacon Broadcasting, Inc., having since acquired Kitchen's 49 percent interest, while Jeffers, who is President and proposed to be full time general manager of the proposed station, has subscribed to 51 percent of the stock. Jeffers also will participate in the day-to-day decision making and direct the operation of the station. Jeffers was born in Cleveland, Ohio, and moved to the Clinton/ Oak Ridge, Tennessee, area and lived there until 1963 (Coastal Ex. 1).

39. In 1960, Mr. Jeffers was employed by the Union Carbide Corporation, a contractor for the Atomic Energy Commission and the Oak Ridge National Laboratory (ORNL). At ORNL, Mr. Jeffers worked as a records clerk and machinist (Coastal Ex. 1, p. 2).

40. Due to a desire to enter the ministry, Mr. Jeffers resigned his position at ORNL and accepted the pastorate of a small Baptist Church in Augusta, Georgia. He worked part time at both driving a school bus for the Richmond County (Georgia) Board of Education and as an announcer/sales person for radio station WGUS in North Augusta, South Carolina. In 1964, he accepted a position in announcing/sales at radio station WIVK in Knoxville, Tennessee. There he was employed until 1966 when he entered the Armed Forces for two years and became Program Director of the American Forces Korea Network (AFKN) in Seoul, Korea, during 1967 (Coastal Ex. 1, p. 2).

41. After receiving an Honorable Discharge from the Army, Mr. Jeffers moved to Charleston, West Virginia, to become Music Director of radio station WCAW, and within one year, manager of the FM affiliate, WVAF (Coastal Ex. 1, pp. 2–3). After two years in Charleston, he moved to Springfield, Missouri, to enter college and became Sales Manager for station KWFC where he was employed from 1970 to 1975 (Coastal Ex. 1, p. 3).

42. In 1975, he became a broadcast consultant for the CLW Communications Group in Chattanooga, Tennessee (Coastal Ex. 1, p. 3). In October 1976, he moved to Corpus Christi, Texas, where he

formed his own advertising agency (Coastal Ex. 1, p. 3). Subsequent to this business venture, Mr. Jeffers managed radio station WITA, Knoxville, Tennessee (Coastal Ex. 1, p. 3).

43. Mr. Jeffers attended school in East Tennessee, counties of Anderson and Knox until he was 17 years of age. After graduating from Clinton High School in 1960, he attended summer school at the Moody Bible Institute in Chicago, Illinois. From May 1970 through May 1974, he attended the Baptist Bible College in Springfield, Missouri (Coastal Ex. 1, pp. 3–4).

44. Mr. Jeffers has been a member of various Baptist Churches since the age of seven, having participated as a Sunday school teacher for junior boys, intermediates, and young adults. He has also served as Pastor and Interim Pastor of four separate churches. In 1966, before entering the armed forces, he was a member of the Knoxville Optimist Club. In 1978, he was instrumental in forming a bowling league in Corpus Christi. Mr. Jeffers has been a member of several Parent-Teacher Associations through various schools in the Corpus Christi area and has also been active in youth rehabilitation activities for troubled and drug addicted young people in the Corpus Christi area (Coastal Ex. 1, p. 5).

*Ultimate Findings and Conclusions*

*Public File Issue*

45. Under the pertinent Rule (Rule 73.3526), every applicant for a construction permit in the commercial broadcast service is obligated to maintain a public file for purposes of permitting the public at large to inspect its contents. At the time Coastal filed its application, on May 7, 1979, its public file was located at 3833 South Staples Street, Suite 46, Corpus Christi, Texas, the address of Professional Advertising Agency owned by William M. Jeffers. The Reverend Willie Lee, CCN's then President, examined Coastal's file there. Lee's object was to review Coastal's file preparatory to filing CCN's application.

46. Sometime in October 1979, Jeffers moved his offices to new quarters at 101 North Shore Line, Corpus Christi, Texas, where his public file was relocated. Jeffers claims to have left a card in the window of his former address giving the new location in Corpus Christi of Coastal's public file. In December 1979, after the file had been relocated, Reverend Lee went to inspect the file again but was unable to find it. Thereafter in January 1980, Jeffers moved to Knoxville, Tennessee, and claimed to be unable to make proper arrangements for the continued maintenance of the file at Corpus Christi. Then he took the file with him to Knoxville, where it remained until August 1980, when it was forwarded to the office of Harry Dobbs in Corpus Christi. Due to his changed, new living environment and new job, Coastal would now admit that Jeffers

simply "forgot about the file." That the Coastal public file was for some months unavailable for public inspection is then quite clear. Hence, at least, the letter of the pertinent Rule was not fully honored. Coastal argues that its failure regarding the public file was experienced "for a relatively short period of time [and] does not warrant disqualification nor, for that matter, any sanction whatsoever." Disqualification, under these circumstances, would, of course, be much too much, but "no sanction whatsoever" judged in terms of a comparative contest surely would also be something less than fair. Thus, at least, a slight demerit should attach to the removal of the public file from Corpus Christi; however "inadvertent."

47. Concerning the evidence addressed to the notions of harassment and overcharging for copying by Ms. Pena, of portions of the Coastal Public File, little more appears than perhaps a mindless aberration on the part of Coastal's principal Jeffers, who may have been simply annoyed that a competing applicant was copying the Coastal application wholesale. In any event, Jeffers' conduct and conversation with Ms. Pena would suggest something far less than undue harassment. In sum, then, the entire Public File issue, save for the imposition of a slight demerit for the period of the file's removal from Corpus Christi, may be otherwise resolved in Coastal's favor. (*Cf., Gross Telecasting, Inc.*, FCC 82R-63, 92 FCC 2d 204, at paras. 70–74 (Review Board).)

*Financial Issue*

48. This issue was added against CCN by *Order*, FCC 81M-938, released April 1, 1981. In CCN's Reply Findings filed August 12, 1982, at para. 9, CCN acknowledges rejection of CCN's Petition for Leave to Amend (filed May 12, 1981) to reflect its financial qualifications. That Petition was rejected for the reasons stated in *Memorandum Opinion and Order*, FCC 81M-2865, released September 10, 1981. Further in CCN's Revised Proposed Findings filed, November 5, 1982, it reiterates that it has financial commitments for a "first quarter operating budget of $206,827 . . ." a sum, it says, more than sufficient to satisfy the first quarter's operating budget. Principally, as CCN regretfully notes, CCN's May 12, 1981, Petition was rejected because of its "untimeliness" and other criteria underlying good cause. *Erwin O'Conner Broadcasting, Co.*, 22 FCC 2d 140, 143 (1970).

49. In its Reply Findings at para. 9, CCN notes that the rejection of its Petition "left CCN substantially short of its intended financial qualification" and prays reconsideration, citing obiter words of the Presiding Judge and certain disposition in *WPIX, Inc.*, 68 FCC 2d 381 (1978). While CCN's citations are greatly misplaced and fail in great measure to support its reasoning, nevertheless, in light of current Commission policy on financial qualification—(*See, Revision of Application for Construction Permit for Commercial Broadcast*

*Stations*, 50 RR 2d 381 (1981)—reconsideration may be and is granted by revisiting the supporting documents to CCN's Petition for Leave to Amend filed, May 12, 1981. In the further light of current Commission mandate, concerning financial qualification of applicants, surely in the given case, the otherwise abiding criteria underlying good cause in *Erwin O'Conner*, *supra*, may, in retrospect, be relaxed. Thus, in the search to discover and select the more qualified of competing applicants, established policy and precedent would also suggest, if not require, that all applicants be given the opportunity to meet basic qualifications to the end that the elements of comparative choice be determined, in the interest of the public with the object of selecting the one who would best or better serve that paramount interest. *Azalea Corp.*, 31 FCC 2d 561 (1971).

50. In spite of Coastal's denigration of CCN's financial supporting documents in CCN's Petition for Leave to Amend of May 12, 1981, a review of those supporting documents, particularly the financial statement of William Reiff, discloses assets having a fair market value clearly in excess of the $200,000 loan he proposes to extend to CCN; indeed, his total sums show real property market values in excess of $860,000 with a mortgage indebtedness of $388,899. Reiff verifies these sums noting that, as an employee of the Texas Real Estate Commission, he is "very familiar with real estate market values in the State of Texas." This surely would comport with the certification made now current in Commission practice. Likewise, Christian Television Services, Inc., listing a net worth of $163,824.91 and premised on the letter of its President to make a $50,000 loan to CCN is also a reasonably acceptable source of financing for CCN. In the same tenor, the handwritten commitment of John Stembridge of Stembridge Furniture, pledging real property or sales equal to the value of the premised loan of $75,000, is equally reasonable, thus an acceptable source of financing to CCN. The listing of expected revenues to be purchased by Lester Roloff on behalf of Roloff Evangelistic Enterprises, Inc., is far less worthy of reasonable assurance; indeed, it would appear highly presumptuous, if not a total myth. Nevertheless, the threshold requirement of first quarter operating expenses would appear to be satisfied by CCN's supporting financial documentation. Reconsideration of this particular feature of CCN's case is therefore GRANTED. What the prospects might be for a full operational budget for a viable UHF television station are, of course, at this point, otherwise unknown. Under the guidelines or standards currently obtaining, CCN is found to be financially qualified.

*Comparative Considerations*

51. At this point, the governing criteria and precedent affecting comparative considerations between the contestants at bar may be addressed. The touchstone for testing the comparative efficacy of

broadcast applicants is, of course, the *Policy Statement on Comparative Broadcast Hearings* (Policy), (1 FCC 2d 393 (1965)) and its progeny of abiding precedent. The two cardinal objectives of that Policy are "first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications." *Id* at 394. To better and early shape the parameters of the Policy and those objectives, that Policy is neither set down as an absolute nor cast in a rigid mold; rather, it speaks in terms of a general policy guideline and is enlightened by a long line of case precedent. As the Court in *TV 9, Inc.* v. *FCC*, 495 F.2d 929, 937 (1973) said in alluding to those two primary objectives ". . . not only are these objectives not exclusive of other considerations but the *Policy Statement* itself disavows an intention 'to preclude the full examination of any relevant and substantial factor.'"

52. As to the primary objective of diversification, here CCN holds no interest in any mass media of communications, while Coastal, through Beacon Broadcasting, Inc.'s acquisition of 49 percent of Coastal stock formerly owned by William J. Kitchen,[8] would now have Beacon's three broadcast stations—WBFU, Winston-Salem, North Carolina; WMOC, Chattanooga, Tennessee, and WPCY, Mobile, Alabama—attributed to Coastal for diversification purposes.

53. And though it may be true, as Coastal notes in conceding attributable broadcast interests, that "Beacon's stations are located well beyond the service area of the proposed Corpus Christi facility," the guidelines or criteria set down in the Policy Statement on this subject are:

> "Without indicating any order of priority, we will consider interests in existing media of mass communications to be more significant to a degree that they:
>
> (a) *are larger*, i.e., *go towards complete ownership and control*; and to the degree that the existing media:
>
> (b) are in, or close to, the community being applied for;
>
> (c) are significant in terms of numbers and size, i.e., the area covered, circulation, size of audience, etc.;
>
> (d) are significant in terms of regional or national coverage; and
>
> (e) are significant with respect to other media in their respective localities." (*Policy, supra*, p. 395.)

54. Measured by the primary objective or standard of diversification, CCN owning no other media interests would warrant a substantial preference over Coastal whose corporate 49 percent shareholder, Beacon, has multiple broadcast media interests, albeit not in the immediate community of Corpus Christi, Texas, but, at least, regionally in the South Eastern area of the United States. (*Cf.*,

[8] Beacon, in turn, is owned by Quality Media Corporation, "a corporation controlled by William J. Kitchen." (Coastal's Supplement to Proposed Findings, pp. 1–2.)

*Muncie Broadcasting Corporation*, FCC 82R-9, released March 5, 1982, p. 8, para. 14.)

55. Though Coastal has acknowledged that the broadcast interests of Beacon are attributable to Coastal through "its principal Kitchen's control of Beacon's parent Quality Media Corporation," Coastal did not spell out or report the class or type of broadcast facilities licensed to Beacon. According to *Broadcasting Yearbook for 1982*, Quality Media Corporation is listed as licensee of three AM stations, WIXO (Coastal lists call letters "WPCY"), Mobile, Alabama; WBFU (AM) Winston-Salem, N.C.; and WMOC (AM) Chattanooga, Tennessee. In any event, the three AM stations licensed to Beacon/Quality appear to be commercial broadcast stations. Clearly, under the governing guidelines of the *Policy Statement*, *supra*, at least under (a), (c) and (d) then, as noted earlier on diversification grounds, CCN, holding no broadcast or other media interests, is to be preferred substantially over Coastal.

56. CCN is a non-profit corporation operated by a board of trustees. The former President, Reverend Willie Lee having resigned, currently Leonard K. Buntrock is Vice-President and "Chief of Operations." William Reiff is Secretary and "currently operating as Treasure[r]." Mary Louise Pena and Beatrice Pena are members of the board of directors and are obviously female and apparently of Hispanic origin. According to Coastal, CCN would be entitled to 42.9 percent integration credit based on CCN's proposal to have Leonard Buntrock as Sales Manager, Mary Louise Pena as Public Affairs Director and Beatrice Pena as Comptroller. Also, Coastal points out that "prior to the 'B' cut-off list, CCN had seven members on its board of directors. However, by amendments dated May 26, 1981, and June 30, 1981, three members resigned. William Reiff is not proposed for any integration credit." (Coastal's Supplement to Proposed Findings filed, September 24, 1982, fn. 3.) Apparently though not specifically claimed, Leonard K. Buntrock and the Penas are local residents of Corpus Christi, Texas, or its environs. Also, an enhancement factor or factors would attach to the qualitative attributes of CCN's proposed integration of ownership and management for female participation and the minority status of the Penas as well as the local residence of all CCN principals. Coastal's principals, it appears, reside outside the city of Corpus Christi, but are otherwise identifiable with the area of Corpus Christi. Jeffers, the 51 percent subscriber to Coastal's stock and proposed full time general manager, would be entitled to qualitative enhancement for broadcast experience as radio station manager and as an announcer/sales person at WGUS, North Augusta, South Carolina, and other broadcast related experience with the Armed Forces Korea Network in Seoul, Korea, during 1967; also for broadcast experience at station WVAF, Charleston, West Virginia; KWFC, Springfield, Missouri; and radio station WITA, Knoxville, Tennessee. Jeffers was also fairly

active in civic affairs in the Corpus Christi area, among others, in youth rehabilitation activities for troubled and drug addicted young people.

57. In sum, then, under the comparative considerations dealing with integration of ownership with management, Coastal quantitatively would be entitled to 51 percent for Jeffers as full time station manager, while CCN would be assigned 42.9 percent for Buntrock and the Pena's proposed managerial positions. Not a great disparity, arithmetically. Premised on Jeffers' past broadcast experience and his area of residence merged with his civic activities, Coastal would be credited with qualitative enhancement of Jeffers' proposed full-time participation as owner and manager but, as the *Policy Statement*, *supra*, notes, these factors while having some importance are of "minor significance."

58. CCN, as noted, would be credited with 42.9 percent integration of ownership with management, enhanced qualitatively by the local residence of Buntrock and the Penas, and further enhanced by the minority attributes of the Penas, female and of Hispanic origin.

59. As noted, in part, earlier, the Court in *TV 9, Inc.* v. *FCC*, (29 RR 2d 963, 965, U.S. App. D.C. (1974)) had observed "The Policy Statement [citation omitted] upon which the Commission relies is not an absolute. It expressly allows 'the full examination of any relevant and substantial factor,' thus recognizing that the Act itself, and not the Policy Statement is the Commission's basic charter." That point, of course, is and must be an accepted fiat. Yet, in the case at bar, which greatly differs with conditions in *TV 9, Inc.*, the otherwise guiding criteria or principles reposing in the *Policy Statement* and current precedent would seem sufficient to arrive at a fair and just resolution of the evidence of record affecting Coastal and CCN. Coastal would be entitled to a slight preference—51 percent—on integration of ownership and management, as enhanced, over CCN with but 42.9 percent such credit. However, on diversification grounds, a factor of primary significance, CCN would be entitled to a clear, thus substantial preference over Coastal, whose 49 percent stockholder, Beacon, owns or controls multiple broadcast interests in the South Eastern region of the United States, albeit not in or close to the community of Corpus Christi, Texas.[9] When one adds the enhancement of female and minority participation to CCN's 42.9% ownership and management, even the slight quantitative ownership/management preference of Coastal would, at least if not disappear, balance out into an even balance on integration of ownership and management considerations between the two. Clearly this would be so when the slight demerit on the

[9] Indeed, it would also appear that Kitchen, who "sold" his interests in Coastal to Beacon, owns or controls Quality Media Corporation which, in turn, owns or controls Beacon.

Public File Issue is attributed to Coastal. And as the Review Board noted in *Nuance Corporation, et al*, FCC 81R-17, released March 5, 1981, in the weighing of record evidence in comparative situations, "It is not just a matter of adjectives—'slight' versus 'substantial'—but one of substance . . . and bear in mind the emphasis in the *Policy Statement*. . . . on the diversification criterion as 'a factor of primary significance,' this preference . . . overcomes [Coastal's] edge on the 'best practicable service' criterion." (At pp. 11–12.) On balance, then, the *residuum* of the evidence would tilt in favor of CCN. And that is the conclusion.

62. A further word or postscript seems appropriate at this point. It may seem a strained metaphor to say that this has been a trying case; certainly not because of seeming closeness of the evidence; nor because of the complexity of the given or added issues. The issues were neither complex nor abstruse. Rather it has been the protracted, perhaps painful experience, of a case poorly prosecuted, particularly by Christian Childrens Network, Inc. Indeed, this has been the single instance in over thirteen years where after repeated exhortations by the forum that the parties follow the not complicated or otherwise difficult process of ordinary Practice and Procedure, the proposals of the parties, again particularly, CCN, respecting findings of fact and proposed conclusions were found unacceptable. Added to this were unexplained removal or withdrawal of counsel for CCN during the course of this proceeding on more than one occasion. In fact, CCN's trial counsel, who, it appears, virtually at the eleventh hour was called to try its case and who did an uncommonly excellent job under the circumstances also disappeared from the scene. Though it is otherwise perfectly proper in these premises for parties to prosecute *pro se*, there are, of course, perils to be faced even in the modesties of these adversary contests. While the perils abound here, they were somehow weathered.

63. In spite of the convolutions of CCN's haphazard pursuit and other imperfections in the prosecution of its application, ultimately identifiable and sufficient grounds can be gleaned from the evidence of record to permit a discernible basis for decision. That being so, Coastal's Motion to Dismiss CCN's application filed, August 13, 1982, for the various grounds stated and which has been held in abeyance WILL BE and IS HEREBY DENIED.

For the foregoing reasons and the public interest so warranting, the application of Christian Childrens Network, Inc., for the captioned facilities at Corpus Christi, Texas, may be and IS HEREBY GRANTED; that being so, the application of Coastal Bend Family Television, Inc., must be and IS HEREBY DENIED.

IT IS SO ORDERED.[10]

FEDERAL COMMUNICATIONS COMMISSION
JAMES F. TIERNEY, *Administrative Law Judge*

[10] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Advertising
Broadcast, Re-Regulation
Program Requirements
Rule Making, Notice of Proposed

*Notice of Proposed Rule Making* adopted soliciting comment on regulatory proposals that would amend policies with respect to commercial TV programming, commercialization, ascertainment, and program logging.
–*Commercial TV Stations*
MM Docket No. 83–670

FCC 83–313

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In the Matter of<br>The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations. | MM Docket No. 83–670 |

NOTICE OF PROPOSED RULE MAKING

(Adopted: June 29, 1983; Released: August 4, 1983)

BY THE COMMISSION: COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT; COMMISSIONER RIVERA CONCURRING AND ISSUING A STATEMENT; COMMISSIONERS FOGARTY AND SHARP NOT PARTICIPATING

## I. *INTRODUCTION*

1. In this *Notice* we are soliciting comment on a number of regulatory proposals that would amend this Commission's policies with respect to commercial television programming, commercialization, ascertainment, and program logging. In taking this action, we seek the widest range of discussion on these proposals in terms of their utility in an increasingly diverse and competitive video marketplace. We also are interested in the extent to which these proposed amendments might mitigate the regulatory burdens and costs imposed on commercial television broadcasters by our present rules and policies, thereby serving the public interest.

2. In the past several years, substantial steps have been taken to reduce the regulatory burdens on broadcasters. Recently the Commission adopted a major deregulatory action relating to program-

ming guidelines, commercialization, ascertainment, and program logs for commercial radio broadcasters. *Deregulation of Radio,* 84 F.C.C. 2d 968, *recon. granted in part,* 87 F.C.C. 2d 797 (1981), *aff'd in part and remanded in part sub nom. Office of Communication of the United Church of Christ* v. *FCC,* D.C. Cir. No. 81–1032 (May 10, 1983) (hereinafter cited as *UCC* v. *FCC*). In that action the Commission deleted the delegations of authority relating to the amounts of nonentertainment programming and commercial matter aired by licensees during their license terms.[1] The Commission also deleted its formal ascertainment requirements and substituted a more informal process whereby all radio licensees are required to develop a community issues/programs list containing a listing of programs aired in response to the perceived issues of importance to a community. Finally, all program logging requirements pertaining to commercial radio stations were deleted from the Commission's rules. This issue was remanded by the court so that the Commission might determine the extent to which program logs are necessary to implement the new regulatory scheme. *UCC* v. *FCC,* slip op. at 48–56.

3. The Commission also has taken action recently to deregulate certain aspects of noncommercial radio and television broadcasting. For example, the Commission significantly decreased its intervention into many of the programming decisions of public broadcasters by modifying its rules relating to promotional programming and "on-the-air" fundraising. *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations,* 86 F.C.C. 2d 141 (1981), *recon. denied, clarification and declaratory ruling granted,* 90 F.C.C. 2d 895 (1982). In August, 1981, the Commission proposed to limit its oversight of noncommercial station programming, to eliminate noncommercial stations' ascertainment obligations, and to delete the program logging requirements. *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees,* 87 F.C.C. 2d 716 (*Notice of Proposed Rule Making* ). In yet another proceeding we have withdrawn many of the structural and programming requirements that previously applied to over-the-air subscription television operations (STV). *Subscription Television Service,* 90 F.C.C 2d 341 (1982), *recon. denied,* 53 R.R.2d 646 (1983).

4. The Commission's efforts to eliminate unnecessary regulation

[1] The delegations, previously found at Section 0.281 and now found in Section 0.283 of the Commission's Rules, are instructions to the Commission's staff regarding when an application must be brought to the attention of the full Commission. Applications meeting the processing guidelines may be granted by the staff. Under the delegations recently deleted for commercial radio stations, any AM station application proposing less than 8 percent nonentertainment programming and any FM station application proposing less than 6 percent nonentertainment programming would have been subject to full Commission review. Similarly, applications proposing more than 18 minutes per hour of commercial matter (with certain exceptions) could not have been granted at the staff level.

have not been restricted to programming-related rules. Indeed, we have concluded two dockets that, taken together, substantially reduce the paperwork burdens required of all broadcasters. In the first action, the Commission adopted a streamlined and simplified license renewal form for both commercial and noncommercial licensees. *Revision of Application for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees,* 49 RR 2d 740, *recon. denied,* 50 RR 2d 704 (1981), *appeal pending sub nom. Black Citizens for a Fair Media, et al.* v. *FCC,* D.C. Cir. No. 81-1710. In the second proceeding, we have eliminated completely the yearly financial reporting requirement imposed on broadcasters. *Amendment of Form 324, Annual Financial Report of Broadcast Stations,* 51 RR 2d 135, *recon. denied,* 52 R.R. 2d 792 (1982).

5. We now believe it is appropriate to begin a commercial television proceeding considering the same type of actions which we recently have taken with respect to radio broadcasting and are currently proposing for noncommercial stations. We feel that exploring such options at this time is particularly justified as commercial television is the sole major broadcast service for which such review has not yet been initiated. Furthermore, the makeup of the video marketplace is changing rapidly. As explained in detail below, commercial television broadcasters are facing increasing competition from alternative media. Because these changes have taken place and additional changes likely will occur in the near future, we intend to evaluate the marketplace to determine whether the public interest can be furthered by competitive forces rather than by the Commission's existing rules and policies.

6. As in the commercial radio and noncommercial broadcasting deregulation proceedings, we are proposing several options for each of the regulations being considered, to wit, programming guidelines, ascertainment, commercial guidelines, and program logs. Each of these options is discussed in detail in Section V of this *Notice.* In general, for all four subject areas, the options represent a continuum from substantial deregulation to taking no action and leaving our present regulations in effect. We hope that by proposing the greatest possible array of options we will stimulate a constructive debate regarding which particular proposals best serve the public interest.

7. This *Notice* is divided into six segments. Following this introductory section, a brief history of the regulations under consideration will be presented. This will be followed in Section III with a discussion of the video marketplace as it currently exists and as it may exist in the near future. Section IV contains a detailed discussion of why we believe that this policy review is appropriate at this time. The actual deregulatory proposals on which we seek comment are detailed in Section V. The final section is devoted to our initial Regulatory Flexibility Act analysis, *ex parte* provisions, filing deadlines, and other procedural information.

## II. *HISTORY OF THE REGULATIONS AND POLICIES AFFECTED BY THIS RULE MAKING*[2]

8. The Federal Radio Commission (FRC), predecessor agency of the FCC, acting under legislative guidelines similar to those contained in the Communications Act of 1934, decided very early in its existence that programming and commercialization issues were proper subjects for its consideration in reviewing the performance of radio broadcast stations. *Great Lakes Broadcasting,* 3 FRC Ann. Rep. 32 (1929), *rev'd in part on other grounds,* 37 F.2d 993 (D.C. Cir. 1930), *cert. denied,* 281 U.S. 706 (1930). Later, FRC consideration of programming "inimical to the public interest" was upheld as a valid criterion to consider in denying a license renewal. *KFKB Broadcast Assoc. Inc.* v. *Federal Radio Commission,* 47 F.2d 670 (D.C. Cir. 1931). A brief history of the four subject areas under consideration in this proceeding is presented below.

A. *Programming.*

9. The Commission's first major policy statement on commercial programming was the 1946 *Report on Public Service Responsibility of Broadcast Licensees,* or, as it was commonly known, the *Blue Book.* [3] In the *Blue Book,* the Commission explicitly recognized the need for broadcasters to air programs of local interest, activities and talent. The primary responsibility for determining the scheduling and content of these local interest programs was placed squarely on the individual broadcaster. The Commission did set limited guidelines for programming in the public interest. For example, the Commission stated that the public interest required an adequate amount of time devoted to the discussion of public issues. Also, some local live and sustaining broadcasts were expected. However, the Commission did not establish any quantitative standards by which it might judge whether a licensee had provided enough of a particular type of programming. Court decisions upheld the Commission's determination that both the content and the amounts of programming aired by licensees were proper subjects for FCC consideration. *Simmons* v. *FCC,* 169 F.2d 670 (D.C. Cir. 1948), *cert. denied,* 335 U.S. 846 (1948); *Bay State Beacon, Inc.* v. *FCC,* 171 F.2d 826 (D.C. Cir. 1948).

10. A second major Commission policy pronouncement concerning programming was issued in 1949. In its *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, the Commission formalized

---

[2] The *Notice of Proposed Rule Making* and the *Report and Order* in the Radio Deregulation proceeding contain excellent and comprehensive historical summaries of the programming guidelines and ascertainment. *See* 73 F.C.C. 2d 457, 460-79 (1979); 84 F.C.C. 2d at 1040–42, 1073–75, 1091–93. Those detailed summaries will not be repeated here.

[3] The *Blue Book* was issued as an internal Commission document and is available in the Commission Library.

the Fairness Doctrine and permitted editorializing by broadcast licensees for the first time. At the same time, the Commission reiterated its previously stated belief that broadcasters should devote a reasonable amount of time to the discussion of public issues. Again, however, the Commission issued no quantitative guidelines, but expressly stated that programming in the public interest was the responsibility of the individual licensee. These concepts once again were sustained by the Commission in its *Report re En Banc Programming Inquiry,* 44 FCC 2303 (1960) (*1960 Programming Statement* ). The Commission restated its view that the individual broadcaster had great discretion in deciding what programming to offer its community, but went a bit further and listed fourteen major elements usually necessary to meet the interests, needs and desires of the community.[4] Later case law made it clear that a licensee's discretion in programming did not include racial discrimination, *LaMar Life Broadcasting Co.* , 38 F.C.C. 1143, 1154–55 (1965), *rev'd and remanded on other grounds, sub nom., Office of Communication of United Church of Christ* v. *FCC,* 359 F.2d 994 (D.C. Cir. 1966), nor ignoring a strongly expressed need, *Stone* v. *FCC,* 466 F.2d 316, 328 (D.C. Cir. 1972). The Commission's policies regarding nonentertainment programming were brought to their present state by the adoption of the delegations of authority in 1973. The history of these delegations is presented in a later section of this *Notice.* [5]

B. *Commercialization.*

11. Recognizing that commercials were, at least for the present, the sole means of support for broadcasting, the Federal Radio Commission took the position that regulation had to be relied upon to prevent abuse or overuse of commercials. *Great Lakes Broadcasting Company, supra.* An early FCC decision considered overcommercialization in the context of a license renewal. *R.R. Jackson,* 5 F.C.C. 496 (1938). Regulation of commercial practices involved the number of commercial interruptions, the length of commercials, and the

[4] The fourteen listed elements are: opportunity for local self-expression, the development and use of local talent, programs for children, religious programs, educational programs, public affairs programs, editorialization by licensees, political broadcasts, agricultural programs, news programs, weather and market reports, sports programs, service to minority groups, and entertainment programs.

[5] In 1974, the Commission also announced a special programming obligation with respect to children. Broadcasters were expected to present educational and age-specific programming designed especially for children. Further, broadcasters were urged to air this programming on weekdays when most child viewing occurs. *Children's Television Policy Statement,* 50 F.C.C. 2d 1 (1974). Broadcaster compliance with the *Policy Statement* was explored in a *Notice of Inquiry,* 43 Fed.Reg. 37136 (1978), and in the report of the Children's Television Task Force, released November 2, 1979. Subsequently, a *Notice of Proposed Rule Making* was adopted looking further at broadcasters' obligation to the child audience. 45 Fed.Reg. 1976 (1980). That proceeding is pending.

balance between commercial (sponsored) and sustaining (unsponsored) programs. In the *1960 Programming Statement* the Commission concluded that there no longer was any public interest basis for distinguishing between sustaining and commercially sponsored programs in evaluating a station's performance. Therefore the Commission limited the responsibility of licensees by stating that individual broadcasters need only avoid abuses with respect to the total amount of advertising time aired and the frequency of interruptions. *Id.*

12. Due in part to a lack of formalized guidelines with respect to its commercialization policy, the Commission adopted a *Notice of Proposed Rule Making,* 28 Fed.Reg. 5158 (1963), looking toward the adoption of rigid commercial standards. Although convinced that an overcommercialization problem existed, the Commission chose not to adopt standard rules, concluding that not enough facts were present to support such rules. Moreover, it was not willing to codify the existing National Association of Broadcasters' commercial guidelines. The Commission did state that it would pay closer attention to commercialization on a case by case basis, and instructed the Broadcast Bureau to bring to its attention those applications proposing the greatest amounts of commercials. *Commercial Advertising Standards,* 36 F.C.C. 45 (1964). From this time until the adoption of the current delegation in 1973, the Commission's major policy statements with respect to commercialization concerned the particular issue of program length commercials. The Commission found such commercials contrary to the public interest because they were programs presented in the interest of saleability, almost always inconsistent with a licensee's representations regarding the maximum amount of commercial matter to be aired in any given hour, and usually resulted in program logging violations. *Program Length Commercials,* 39 F.C.C. 2d 1062 (1973). Most recently, the Commission refused to initiate a rule making proceeding on the subject of overcommercialization, citing a lack of adverse viewer reaction and recent First Amendment cases recognizing that commercial speech deserves constitutional protection. *Television Overcommercialization,* 49 RR 2d 391 (1981). The Commission further noted that the industry was best regulated through self-imposed voluntary restraints and that existing Commission policies and guidelines insure that broadcasters will operate in the public interest. *Id.*

C. *History of Delegations.*

13. At its establishment in 1951, the Broadcast Bureau was given delegated authority to act on certain broadcast applications. *See* 47 C.F.R. §0.241 (1952). Beginning in the early sixties, the Commission began to reappraise its existing delegations. In order to give more guidance to the Broadcast Bureau, the Commission adopted a set of confidential notations to the delegations. *Notations re General*

*Agenda,* June 28, 1961. These notations limited the Bureau's authority to act on certain types of broadcast applications. According to an in-house memorandum to the Commission, the notations substantially incorporated the informal criteria that the staff had been using to screen applications. Specifically, the notations provided that the Broadcast Bureau could not act upon any application which proposed any of the following:

(1) greater than 85 percent commercial programming;

(2) less than 5 percent local live programming;

(3) greater than 90 percent network programming;

(4) less than 10 percent sustaining programming between 6–11 p.m.;

(5) greater than an average of 12 commercial spot announcements during one hour; and

(6) no programming in the following categories unless an adequate explanation was given: entertainment, religious, agricultural, educational, news, discussion (forum, panel, round table), and talks (all conversational not falling under one of the above categories).

Thus, as early as 1961, the Commission had adopted formal processing guidelines relating to broadcasters' programming obligations.[6] It is important to note, however, that even these earliest of guidelines were procedural only; they merely indicated when the full Commission was to be alerted to a particular application.

14. After a lengthy review of the delegations, the 1961 notations, and existing Commission policy and precedents, the Commission adopted its present delegations format in 1973. *Delegation of Authority,* 43 F.C.C. 2d 638. The publication of these more specific delegations gave the industry and its legal representatives, for the first time, a clear insight into the general benchmarks used in determining whether particular matters were to be referred to the Commission.[7] Neither the published Commission *Order* establishing

[6] The actual delegation of authority contained in the Commission's published rules stated that the Bureau could grant applications ". . . which comply fully with the requirements of the Communications Act and the provisions of this chapter, accord with Commission policy and standards, are not mutually exclusive with any other applications, and concerning which no petition to deny . . . or other substantial objection has been filed." 47 C.F.R. §0.281(a)(1) (1962).

[7] The new delegations provided that applications proposing the following types of programming should be sent to the Commission for its consideration: proposals exceeding 16 minutes of commercial matter per hour, with specified exceptions during political campaigns; proposals containing less than 10 percent total nonentertainment programming; proposals containing substantial ascertainment defects that cannot be resolved on the staff level; applications proposing substantial shifts in the station's entertainment or nonentertainment formats; renewal, transfer, and assignment applications that vary substantially from prior representations with respect to nonentertainment programs or commercial practices.

the delegations nor the staff memorandum explaining the changes made much mention of how the guidelines were set, except with respect to the sixteen minute guideline for commercial practices, which was considered to be in general accord with industry standards.

15. In adopting the latest programming delegations for commercial television, the Commission added two new categories for consideration. *Delegations of Authority,* 59 F.C.C. 2d 491 (1976). In addition to the nonentertainment programming standard, the guidelines provide that applications proposing less than 5 percent local programming and less than 5 percent informational programming will be referred to the full Commission. The local guideline was added in recognition of the importance of every broadcast facility's function as a locally oriented transmission service. The informational guideline was meant to reaffirm the special contribution to an informed public opinion made by news and public affairs broadcasts. Based on information collected from the 1973 television programming report, Form 303-A, the Broadcast Bureau found that 93 percent of all VHF network affiliates, 83 percent of all VHF independent stations, and 78 percent of all UHF affiliates met the newly established guidelines. Unaffiliated UHF stations are exempt from the programming guidelines.

16. Since establishing and expanding the processing guidelines in 1976, the Commission has not been inclined to impose additional programming responsibilities on commercial television licensees. For example, in response to a petition seeking the reporting of additional programming categories by commercial television stations, the Commission reasoned that establishing additional reporting categories might imply some obligation to provide that type of programming even though the Commission does not require it. On that basis, the Commission declined to establish a new category of "community service programming." *Community Service Programs,* 82 F.C.C. 2d 130 (1980), *recon. denied,* 50 RR 2d 1245 (1982). In another proceeding, the Commission afforded broadcasters greater programming flexibility by permitting the use of public service announcements in responding to the perceived needs of the community. *Public Service Announcement,* 81 F.C.C. 2d 346 (1980).

D. *Ascertainment.*

17. The Commission's first major policy statement on ascertainment was contained in the *1960 Programming Report.* The Commission stated that all broadcasters must ascertain the needs and interests of their service areas and reasonably attempt to meet all such needs. Proper ascertainment required that broadcasters make a diligent, positive and continuing effort to discover and fulfill the tastes, needs and desires of their service areas. In setting up this procedure, the Commission intended that ascertainment would

become a formal part of every application and license renewal proceeding. Furthermore, the Commission specified not only what it expected out of ascertainment, but how the process should be accomplished. The fact that the Commission was serious about its ascertainment requirements was shown shortly after the release of the *1960 Programming Statement* when the Commission denied an application for a new FM station based on inadequate ascertainment. *Suburban Broadcasters*, 30 F.C.C. 1021 (1961), *aff'd sub nom. Henry* v. *FCC*, 302 F.2d 191 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 821 (1962).

18. The Commission imposed a more formalized four step ascertainment process when it adopted its new television application forms. *Television Program Form*, 5 F.C.C. 2d 175 (1966). Applicants were expected to provide full information on the following matters:

(a) the steps taken to become informed of the problems and needs of the area to be served;

(b) the suggestions received as to how the station could help meet those problems;

(c) the applicant's evaluation of the suggestions; and,

(d) the programming proposed to meet evaluated problems and needs. *Id.* at 178.

During the next several years, the Commission became increasingly aware of the questions and problems that its ascertainment procedures were creating. Consequently, the Commission issued a *Notice of Inquiry* seeking comment on the development of a detailed ascertainment Primer. 20 F.C.C. 2d 880 (1969). A Primer containing 36 questions and answers about the ascertainment process was subsequently adopted by the Commission. *Ascertainment of Community Problems*, 27 F.C.C. 2d 650 (1971).

19. In the ascertainment Primer the Commission set out standards for determining the composition of the area to be served, consultations with community leaders and members of the general public, enumeration of community problems and needs, evaluation of the problems and needs, and relating proposed programming to the evaluated problems and needs. Several years later, a Primer was adopted specifically for renewal applicants. *Ascertainment of Community Problems by Renewal Applicants*, 57 F.C.C. 2d 418 (1975), *recon. granted in part*, 61 F.C.C. 2d 1 (1976). Although the substantive requirements of the original Primer were retained, the Renewal Primer provided for the following procedural changes:

(a) an ongoing ascertainment process throughout the license term;

(b) a community leader checklist;

(c) the specific number of consultations to be made, based on the size of the community of license;

(d) maintaining information on the composition of a licensee's community in its public file;

(e) annually filing a list of no more than ten problems and needs of a broadcaster's service area along with a list of programs treating those problems and needs; and,

(f) placing documentation of ascertainment procedures in the station's public inspection file.

Failure to conduct ascertainment in accordance with the requirements of the Primers has resulted in the denial of applications, and such denials have been upheld in court. *See, e.g., Bamford* v. *FCC*, 535 F.2d 78 (D.C.Cir. 1976).[8]

20. In its most recent actions regarding ascertainment, the Commission declined a request to add homosexual and handicapped groups to the community checklist. The Commission did state, however, that groups coming forward for consultation must be included if the licensee considers these groups to represent a significant segment of the community's population. *Ascertainment of Community Problems*, 76 F.C.C. 2d 401 (1980). In a separate proceeding, the Commission approved the use of public service announcements in responding to problems discovered through ascertainment. *Public Service Announcements*, 81 F.C.C. 2d 346 (1980). Also, the Commission recently relieved small market (defined as communities of less than 10,000 persons and that are outside all SMSA's) television renewal applicants from the obligation to conduct formal ascertainment surveys. The Commission stated its belief that small market broadcasters are sufficiently familiar with their communities to enable them to develop responsive programming without the substantial administrative burdens associated with formal ascertainment procedures.[9] *Small Market Ascertainment Exemption*, 86 F.C.C. 2d 798 (1981), *aff'd sub nom. National Black Media Coalition* v. *FCC*, D.C. Cir. No. 80-1758 (May 10, 1983). Finally, the Commission has eliminated the requirement that all applicants for a construction permit file an ascertainment study. Now, only applicants for a broadcast license must submit such studies. *Revision of Application for Construction Permit for Commercial Broadcast Station*, 50 RR 2d 381, 382–83 (1981).

E. *Program Logs.*

21. Some type of program logging requirements have existed virtually since the beginning of broadcast regulation. The original program logs adopted by the Federal Radio Commission contained

[8] Procedurally, ascertainment issues are the subject of a delegation similar to the program guidelines. The staff must refer to the full Commission commercial television proposals that contain substantial ascertainment defects that cannot be resolved by further staff inquiry or action. Section 0.283(a)(8) of the Commission's Rules.

[9] As of 1980, the Commission calculated that 29 commercial television stations would be affected by this exemption. The ascertainment requirements for all radio stations were rescinded in the *Radio Deregulation* proceeding.

only two provisions: the entry of all station and all call announcements along with the time of broadcast; and, an entry describing each program broadcast and the time of the program's beginning and end. General Order No. 106, 5 FRC Ann. Report 96 (1931). The 1934 codification of the FRC's rules contained two additions to the program logging requirements. The new rules required broadcasters to log program descriptions by categories and also required all political speeches to be entered as such with the name and political affiliation of the politician for whose benefit the speech was presented. FRC Rules and Regulations, Section 172(A) (1934).[10] Neither the 1931 nor the 1934 regulations were accompanied by any explanation of the regulatory purpose or potential effect of the logging requirements.

22. As the regulation of broadcasting became more pervasive, the program logging requirements became more detailed. For example, to implement the stated goals of the *1960 Programming Statement*, the Commission amended the logging rules to require the contemporaneous maintenance of a comprehensive record of programs by specific categories. *Amendment of Program Logging Rules for Television Broadcast Stations*, 5 F.C.C. 2d 185 (1966). Later, the Commission required that television program logs be made available for public inspection if the requestor of the information met certain procedural safeguards. *Program Logs*, 44 F.C.C. 2d 845 (1974), *recon. denied*, 45 F.C.C. 2d 781 (1974).

## III. *THE TELEVISION MARKETPLACE*

23. In discussing the extent of competition in a particular industry, the scope of the market must first be defined. The relevant market has two components: product and spacial or geographic. Generally, a "relevant market" is the broadest market that is sufficiently narrow to exclude products from other producers, whether located in the same, adjacent, or remote geographical areas, that cannot compete on substantial parity with those included in the market. In terms of the geographic component, the television marketplace may in a sense be characterized as both a national and a local market. Markets for television equipment and programs may reasonably encompass the entire nation, whereas the geographic market for home viewed television programming might be extremely local. Interested parties should keep this national/local dichotomy in mind when responding to our questions on whether the increasingly competitive nature of the television marketplace makes the present level of regulation unnecessary. Because the relevant geographic market might be characterized as local, it is conceivable that certain localities may be sufficiently competitive to justify a greater degree

[10] The 1934 Rules as well as the Federal Radio Commission Annual Reports are available in the Commission's library.

of deregulation than a less competitive geographic market. In arriving at a definition of the second component of the market, that is, the product market, substitutability among alternatives should be considered. To illustrate, if two services are substitutes they should both be included in the same market and thus be considered as competitors. As their degree of substitutability declines, they provide less competition to one another until the point where they should be classified as belonging in separate industries. There is, however, no hard and fast rule to use in drawing industry lines.

24. In the case of traditional over-the-air television broadcasting, the industry can be construed too narrowly when, in fact, the appropriate confines of the market extend beyond its traditional boundaries. Therefore, in this section of the *Notice*, we assess those technologies that may provide genuine substitutes in the viewer's mind for regular television broadcasting as well as the extent of competition within a narrowly defined over-the-air television submarket.

25. According to the FCC staff report regarding policy on cable ownership, about 90 percent of all television households receive four or more television signals.[11] A. C. Nielsen Co. reports this figure to be significantly higher at 97 percent.[12] In any case, it would appear that almost all television households have access to at least four television signals. In fact, Nielsen figures also indicate that 65 percent of television households receive seven or more signals. These figures illustrate the dramatic increase in signal availability since 1964, when only 26 percent of television households received seven or more signals and only 78 percent received four or more.

26. The total number of commercial television stations in operation has grown from a total of six in 1945 to 439 in 1955 to over 800 at present. Also, it is significant to note that the number of UHF stations in operation, over 200, has more than doubled since 1965.[13] Commercial television stations also must compete against noncommercial, educational television operations. The number of such stations in operation has grown from only 9 in 1955 to around 270

---

[11] *FCC Staff Report on Cable TV Cross Ownership Policies*, November 17, 1981, pages 62–64. Tables 1 and 2 report this figure as 90.26 and 89.75 depending on assumptions; table 3 states 90 percent receive 3 or more television stations again using different assumptions.

[12] *Nielsen Television 1980; see also Wines, The Cable Revolution - Tough Choices for the Industry and the Government*, the National Journal, page 1891, October 24, 1981 (hereinafter "Wines").

[13] Appendix A, Table I shows the growth of commercial television stations on a yearly basis.

today. More than half of these stations broadcast on UHF frequencies.[14] Predictions of future growth show that most markets will have even more television stations by 1986.[15]

27. In addition to direct competition in the form of traditional over-the-air television broadcasting, other delivery systems have burgeoned and thus offer additional avenues of video product delivery to consumers. The most notable of these is cable television. Originally a delivery system designed to provide viewable television signals to remote or shielded areas of rural America, cable television has expanded into the urban and suburban markets with offerings of programming not available over-the-air. In 1952, approximately 70 systems in the United States served a total of 14,000 subscribers. The subscribers total did not reach the one million mark until 1964. Ten million subscribers were reported for 1976, and that number has almost tripled since that time.[16] The percentage of homes that subscribe to cable is predicted to increase from a current estimated 37 percent of all television households in the United States to about 50 percent in 1985.[17]

28. In addition to offering the signals of local and distant television stations, some cable systems offer cable program channels that are paid for over and above the basic cable services. It is predicted that up to 46 percent of United States television households will subscribe to these pay cable channels by 1990 (up from 17 percent by current estimates).[18] Older cable systems with 12 channels are giving way to upgraded, state of the art, systems with 36 channels or more. Newer systems can offer up to 100 channels, which can deliver an ever increasing array of satellite-delivered program services, community access programming, data information, pay services, and, of course, local and distant broadcast signals.

29. Subscription television channels also offer alternative programming to the consumer. STV is now available on 20 stations in the United States. Most of the stations are in larger markets, but now that several restrictive regulations have been removed, STV could possibly gain footholds in smaller markets.[19] STV subscribers now number about one million. Additionally, the Commission recently authorized all ABC affiliates to offer ABC's proposed Home

---

[14] Appendix A, Table II shows the growth of noncommercial educational stations on a yearly basis.

[15] *New Technologies Affecting Radio and Television Broadcasting*, National Association of Broadcasters, Appendix 1, November 1981.

[16] Appendix A, Table III contains a growth chart showing the yearly increase in cable television subscribers.

[17] The actual prediction falls between 35 percent and 65 percent with 50 percent being the average. Wines, *supra*. *Cablevision* magazine predicts that 62 percent of all television households will subscribe to cable by 1990.

[18] *Cablevision*, November 1, 1982.

[19] *See Subscription Television Service*, 90 F.C.C. 2d 341 (1982).

View Network. This service involves the early-morning transmission of scrambled pay programming. Subscribing owners of video recorders will be able to descramble and record the programming for viewing at more convenient times.[20]

30. Multipoint Distribution Service also delivers a pay service to consumers over the air via a microwave signal. Although similar in function to an STV operation, MDS currently is regulated as a common carrier. Due to high frequency, low power operation, MDS is limited to line-of-site transmission, thereby reducing the potential audience it can serve. At present, there are approximately 500,000 MDS subscribers. The Commission recently increased the spectrum allocated to MDS and approved in principle the concept of multichannel MDS or "wireless" cable systems".[21]

31. Other new forms of video delivery systems that compete for the attention of the viewer are video tape recorders and video disk players. Video tape recorders not only use prerecorded tape but also permit the operator to record programs from other media, thus enabling the consumer to view programming at his leisure.[22] Currently, there are an estimated 3.5 million homes with video recorders representing about 4.2 percent of U.S. households.[23]

32. Video disk players are relatively new to the marketplace. Although they do not have recording capabilities, they are cheaper than video tape recorders. Prerecorded software also is cheaper for the disk player. Given its relatively recent introduction into the marketplace it would be premature to predict video disk penetration of television households. However, programming availability for both video disk and video tape players continues to expand. There are approximately 33,000 titles available now for both types of players and the potential exists for other specialized services to develop.[24]

33. Along with the multitude of services just discussed, other potential services could make significant breakthroughs that would add to the competitive nature of the video marketplace.[25] Direct

---

[20] The authority for ABC stations and affiliates to operate subscription television services was granted August 4, 1982. *See* letters to American Broadcasting Companies, Inc., Mimeo Nos. 31909 and 31910, released August 10, 1982. File Nos. BSTV-820429KE-KI and KL.

[21] *See Report and Order* in Gen. Docket No. 80–112, mimeo no. 33344 adopted May 26, 1983; *Notice of Inquiry and Proposed Rule Making* in CC Docket No. 80–116, 45 Fed. Reg. 29335, published May 2, 1980. Docket 80–116 proposes options for hastening MDS assignment procedures.

[22] Copyright liability for such uses has come under court scrutiny. *Universal City Studios, Inc.* v. *Sony Corp. of America*, 659 F.2d 963 (9th Cir. 1981), *cert. granted*, ___ U.S. ___, 102 S.Ct. 2926 (No. 81–1687, 1982).

[23] *Cablevision*, November 1, 1982.

[24] *New Technologies Affecting Radio and Television Broadcasting*, National Association of Broadcasters, pp. 36–37, November, 1981.

[25] Although not generally considered in conjunction with the television market,

broadcast satellite (DBS) could bring additional channels directly into the home from an orbiting satellite. Eight companies have received conditional authorizations to construct high power DBS systems, which could begin service as early as 1986. Moreover, the Commission recently has given its approval to the use of existing satellites for the delivery of video services to the home, which may result in satellite-based services becoming available even sooner.[26] The Commission also has adopted rules that would allow low power television stations to originate programming, sell time to advertisers, or operate in a pay mode. *Low Power Television Service*, 51 RR 2d 476 (1982). As originally conceived, the low power service was intended to provide additional television service to rural areas and minority groups. When fully developed, this service may provide up to 4,000 additional video outlets across the country.

## *IV. THE NEED TO REEVALUATE OUR REGULATIONS*

34. One reason for initiating this rule making at this time is to take into account the changes taking place in the marketplace and to seek comment on whether these changes may provide sufficient justification for amending our present regulations and policies. In this regard, several specific questions come to mind. When assessing the geographic component of the relevant market, should we view the market nationally or on the basis of a local home viewing market? Might different regulatory schemes be implemented depending on the competitiveness of locally defined markets? Within the relevant geographic market, do the alternative media discussed above represent true substitutes for commercial television viewing? Is the market now, or will it be in the near future, sufficiently competitive to serve as a reliable alternative to existing Commission regulation of licensee programming and commercialization practices? With respect to the potential competition offered by such incipient services as DBS and LPTV, should we look to some future level of availability before adding them to our competitive matrix? Can we fairly make a finding of workable market competition based on these as yet potential services? Are existing or potential competitive forces strong enough to assure that the Commission's public interest objectives will be satisfied?[27] We readily admit that

---

movie viewing certainly competes with television viewing as a source of entertainment. Home video games represent additional competition for over-the-air television stations. Further, at least with respect to news and public affairs, local radio stations, newspapers, and news magazines may be considered reasonable substitutes for television viewing.

[26] *See Direct Broadcast Satellite Service*, 90 F.C.C. 2d 676 (1982); *Satellite Television Corporation*, 91 F.C.C.2d 953 (1982); *CBS, Inc. et al.*, 92 F.C.C.2d 64 (1982); *First Report and Order* in Gen. Dkt. No. 80–739, FCC 83–272 (adopted June 2, 1983); *see also GTE Satellite Corp.*, 90 F.C.C.2d 1009 (1982), *recon. denied*, mimeo no. 31754. adopted June 2, 1983.

[27] Several analyses have been published which offer conflicting views on the

the television marketplace may be different from the radio marketplace, on which we based in part our recent radio deregulation actions. Interested parties may wish to comment on whether any such differences should affect our thinking with respect to amending our commercial television rules and policies. Parties also may wish to address the extent to which this agency may amend its policies even assuming no change in circumstances has taken place. *See Greater Boston Television Corp. et al.* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970).

35. Given the fact that the video market is becoming increasingly competitive, the particular regulations under scrutiny in this proceeding may impede the ability of commercial television licensees to compete with other, unregulated or less regulated technologies, thereby inhibiting their ability to serve the public fully and to grow. For example, cable television system operators are not guided in their choice of programming by local, news, or nonentertainment guidelines. Our cable television rules contain no ascertainment or program logging obligations, nor do cable systems operate under any commercialization policies. With some exceptions, the programming requirements that are applicable to cable systems are similar to those that are imposed on broadcasters by the Communications Act rather than by the Commission's rules.[28] In fact, the Commission recently adopted a *Notice of Proposed Rule Making* looking toward the deletion of many of these programming requirements for cable systems. *Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems*, 48 Fed. Reg. 26472 (1983). Various pay services, regardless of whether they are delivered by cable systems, over-the-air broadcast stations (STV), or MDS, do not labor under non-statutory content restrictions. Furthermore, the Commission has deleted one peripheral programming requirement for STV stations, the rule which requires all STV stations to present at least 28 hours per week of conventional, non-pay programming. *Subscription Television Service*, 90 F.C.C. 2d 341, 351–54 (1982). We also note that no special programming requirements have been proposed or

---

competitiveness of the video marketplace. *See, e.g.*, Majority Majority Staff of the House Subcommittee on Telecommunications, Consumer Protection, and Finance, 97th Cong., 1st Sess., TELECOMMUNICATIONS IN TRANSITION: THE STATUS OF COMPETITION IN THE TELECOMMUNICATIONS INDUSTRY 374–377 (Comm. Print 1981); FCC Office of Plans and Policy, MEASUREMENT OF CONCENTRATION IN HOME VIDEO MARKETS (1982); National Telecommunications and Information Agency, PRINT AND ELECTRONIC MEDIA: THE CASE FOR FIRST AMENDMENT PARITY (1983). Interested parties are asked to comment on the varying conclusions reached in these and other relevant studies.

[28] Under the Commission's Rules, cable systems which originate programming are subject to obligations concerning equal opportunities for political candidates, § 76.205; fairness, personal attack, and political editorial requirements, § 76.209; a lottery information prohibition, § 76.213; restraints on the presentation of material that is obscene or indecent, § 76.215, and sponsorship identification requirements, § 76.221. As to statutory programming obligations, *see* n.50, *infra*.

even recommended for emerging technologies such as Direct Broadcast Satellites (DBS) or low power television.[29] Finally, as noted previously, the Commission is proposing a substantial reduction in the programming and ascertainment responsibilities of noncommercial television stations. *Revision of Programming Policies and Reporting Requirements Related to Public Broadcasting Licensees*, 87 F.C.C. 2d 716 (*Notice of Proposed Rule Making* 1982). Given the fact that competing technologies and emerging delivery systems are unlikely to be burdened by programming restrictions, it may not be in the public interest to continue a regimen of comprehensive program regulation for commercial television broadcasters. Such unequal treatment may result in an increasing inability to compete with other technologies and may provide a disincentive for commercial television broadcasters to experiment and innovate in their programming.

36. A third justification for this regulatory review is reflected in Congress' expression of a strong national policy against government over-regulation.[30] For example, in 1980 Congress passed the Regulatory Flexibility Act, which is designed to relieve small businesses and entities from pervasive government requirements. The findings and purposes of the Act are instructive. Among other things, Congress specifically found:

> (a) agencies should achieve stated goals as effectively and efficiently as possible without imposing unnecessary burdens on the public;
>
> (b) uniform regulations and reporting requirements have, in numerous instances, imposed unnecessary and disproportionately burdensome demands upon small businesses with limited resources;
>
> (c) regulations have adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity;
>
> (d) pervasive regulations have created barriers to entry; and,
>
> (e) unnecessary regulations may lead to inefficient use of regulatory agency resources.[31]

Another major regulatory act of Congress, the Paperwork Reduction Act of 1980, lists, *inter alia*, the following purposes:

> (a) minimize the Federal paperwork burden for individuals, businesses, state and local governments;

---

[29] We do recognize that insofar as it is a broadcast service, low power television would have to comply with legislative programming requirements found in the Communications Act and the U.S. Criminal Code. *See Low Power Television Service, supra*, at para. 105. The same is true for those DBS operators who are classified as broadcasters. *See Direct Broadcast Satellite Service*, at paragraph 86.

[30] The 94th Congress introduced over 100 bills dealing with regulatory reform. G.A.O., *Government Regulatory Activity: Justifications, Processes, Impacts, and Alternatives*, p. 1, June 1977.

[31] Regulatory Flexibility Act, PL 96–354, Section 2(a), 5 U.S.C. § 601, note.

(b) minimize the cost to the Federal government of collecting, maintaining, using, and disseminating information; and,

(c) maximize the usefulness of the information collected.

The stated goal of the legislation is to reduce the 1980 paperwork burden by 25 percent in three years.[32] Although these legislative pronouncements may not be directly applicable to the instant proceeding, we think the purposes and intents of these acts offer additional and compelling justification for the actions we are proposing.

37. In the preceding paragraphs we have discussed commonly held views on the detrimental nature of unnecessary government regulation: they are costly, and, in the case of the programming requirements, they impose competitive disadvantages on commercial broadcasters that may stifle experimentation and innovation. Moreover, the case for revisiting and perhaps modifying our programming policies becomes even more compelling when we remember that we are dealing with rules and regulations that relate to the sensitive area of program content. It is at least arguable that our programming guidelines and commercialization policies impinge on a broadcaster's editorial discretion even though those guidelines have no substantive effect. If the Commission's policies have limited continuing utility or if their viable purposes may be achieved by less intrusive means, then the public interest would seem better served by the elimination or modification of such policies.

38. Many of the regulatory burden figures cited herein demonstrate the costly nature of the specific regulations being considered in this proceeding. The paperwork burdens imposed by our rules, plus other, more intangible burdens such as reduced editorial discretion and licensee inflexibility suggest that the costs of retaining our present rules may not be justified in relation to their benefits. Accordingly, a straightforward cost/benefit analysis may provide yet another specific justification or rationale for our proposed actions. Parties are encouraged to conduct such analyses and to comment on the propriety of utilizing a cost/benefit rationale as an additional or alternative justification for any final action we might take. In commenting on this and other rationales as bases for our deregulatory proposals, parties should bear in mind that all rationales do not necessarily apply to all four areas that we are reviewing. Heightened competition may, for example, be directly relevant in evaluating the possible elimination of our commercializa-

[32] Paperwork Reduction Act of 1980, PL 96-511, Section 2(a), 44 U.S.C. § 3501; Senate Report No. 96-930, p. 2. We note that, due to recent substantial decreases in our reporting requirements, the Commission has reduced its paper work burden on regulated industries by 63.9 percent since 1980. Approximately 17 million burden hours were eliminated by our abolition of the program log requirements for commercial radio stations. Office of Management and Budget, INFORMATION COLLECTION BUDGET 3, 41 (1982).

tion and programming guidelines, but of substantially less importance to our reasoning in addressing program logging or ascertainment requirements, where direct cost/benefit analysis may be most pertinent.

39. Having presented several general rationales for our regulatory review, we now wish to focus on the particular regulations and policies under consideration. We begin our review of the programming and commercialization guidelines by reiterating that the guidelines as written are theoretically procedural. They are intended solely to direct the Mass Media Bureau as to when a particular application must be presented to the Commission *en banc* for consideration. However, it is clear that the delegations have taken on substantive overtones, at least in the minds of commercial broadcasters. This fact was well evidenced by broadcasters' comments in the Children's Television proceeding, in which Commission proposals to adopt processing guidelines on children's programming were almost universally criticized as being substantive in nature.[33]

40. In many instances, however, the Commission has cautioned against relying on percentage guidelines as indicators of substantive performance. Thus, the Commission has stated that service cannot be measured by a simple program percentage test, *North American Communications Corp.*, 69 F.C.C. 2d 1756 (1978), and that it will not dictate the amount or format of news or public affairs programming. *Kaye-Smith Enterprises*, 71 F.C.C. 2d 1402 (1979). Moreover, it is clear that failure to meet the standards is not necessarily a bar to renewal. The Commission ultimately must determine whether the proposal is reasonably calculated to meet the needs of the community. *See, e.g., International Television Corp.*, 44 RR 2d 1115 (1978); *Roy H. Park*, 69 F.C.C. 2d 1603 (1978).

41. Perhaps most indicative of the Commission's attitude about programming guidelines is its reluctance to apply similar guidelines in other contexts. In explaining why it decided not to impose programming categories as an aid in determining substantial service for comparative renewal proceedings, the Commission stated its belief that almost all licensees would adopt the FCC guidelines as their own minimum standards.[34] This, opined the Commission, could result in artifically increased levels of local news and public affairs programming. The proposal was rejected as a "simplistic, superficial

---

[33] *See, generally*, the comments filed by broadcasters in response to Option IV of the *Notice of Proposed Rule Making* in Docket 19142. The substantive significance of the guidelines is further highlighted by the fact that the Commission has deferred to licensee discretion whenever the guidelines have been met, even in the context of highly contested proceedings. *See, e.g., KCOP Television, Inc.*, 71 F.C.C. 2d 1430 (1979); *Commercial Radio Institute, Inc.*, 43 RR 2d 1247 (1978); *Turner Communications*, 46 RR 2d 1646 (1980).

[34] *Standard for Substantial Program Service*, 66 F.C.C. 2d 419, *aff'd sub nom. National Black Media Coalition* v. *FCC*, 589 F.2d 578 (D.C. Cir. 1978).

approach" which would almost certainly encroach on the broad programming discretion enjoyed by licensees. In a more recent action, the Commission stated that general percentages or numerical guidelines were not appropriate standards for determining the weight to be given an incumbent's record in the comparative renewal context. *Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, 88 F.C.C. 2d 120 (*Notice of Inquiry* 1981). The Commission also declined to establish additional program categories on the basis that a new category might imply some obligation to provide that type of programming even though not required by the Commission. *Community Service Programs*, 82 F.C.C. 2d 130 (1980), *recon. denied*, 50 RR 2d 1245 (1982). All of these arguments for not establishing new guidelines and program definitions may be equally relevant to the question of eliminating the Commission's present programming and commercialization processing guidelines for commercial television stations, at least insofar as those guidelines have assumed substantive overtones. To the extent that licensees consider our processing guidelines to be substantive requirements, our judgments are being substituted for theirs. Yet, they are in a better position to determine local needs and interests than we.

42. The purpose of ascertainment, as originally stated in the *1960 Programming Statement*, was to insure that licensees took the necessary steps to inform themselves of the real needs and interests of the areas they served to enable them to provide for those needs and interests. Thus, broadcasters are required not only to ascertain, but also reasonably to respond to their findings. However, the generalized ascertainment requirement of the *1960 Programming Statement* became a more formalized four-step ascertainment procedure by the mid-sixties. This procedure eventually was transformed into the rigorous specifications of the ascertainment Primers in the early seventies. Furthermore, it often is argued that the form of ascertainment has replaced its substance. As reported in the *Radio Deregulation Notice*, the Pike and Fischer Radio Regulation Digest currently contains over sixty pages of ascertainment annotations, most of which relate to disputes over mechanistic aspects of the process. Indeed, we candidly have characterized ascertainment proceedings as "litigation over trivia." *Revision of Application for Construction Permit for Commercial Broadcast Station*, 50 RR 2d 381, 383 (1981).

43. At present, all commercial television licensees except those qualifying under the small market exemption must continuously ascertain community needs and interests according to the Renewal Primer. Under our revised renewal procedures, except for those few stations submitting the long form audit, ascertainment studies need not be submitted to the Commission at renewal time, but must be included in the station's public file. *See* Section 73.3526(a)(9), (11),

and (12) of the Commission's Rules. Also, all applicants for a new television broadcast license must conduct an ascertainment study. Proposed transferees and assignees of television stations are also obligated to ascertain community needs. The data collected in our radio deregulation proceeding indicate that, for commercial radio stations, our ascertainment requirements cost anywhere from $167 to $20,000 per year. In our system of commercial broadcasting, these costs are considered when stations set their advertising rates and ultimately the consumer must pay for our requirements.[35] Thus, it appears that the costs of ascertainment to the industry and the consumer are significant.[36] We question whether these costs are justified by the benefits derived from our formal ascertainment obligations.

44. We seek comment on the question of whether ascertainment has outlived its usefulness and should therefore be discontinued or at least modified as a formal Commission policy. The process may well have provided a useful analytical tool during the industry's earlier days. Today, however, the importance of news and public affairs programming to the public is beyond dispute. In order to compete, broadcasters constantly must stay aware of the public's desire to be informed about the issues facing their communities. The increased importance of such community-responsive programming coupled with the generally heightened level of competition in the video marketplace forces the broadcaster to be aware of the needs and interests of its service area quite apart from any formal ascertainment mechanism imposed by this Commission. Television stations that fail to meet their communities' needs will most likely receive the ultimate sanction: viewers will stop viewing.

45. Another reason for reviewing our programming and ascertainment policies at this time is the fact that, on the whole, broadcasters appear to be presenting more informational, local, and nonentertainment programming than called for under our programming guidelines. For those programming categories currently covered by our processing guidelines, information taken from the 1979 Programming Report, Form 303-A, indicates that from 6 a.m. to midnight, the program schedule of the average commercial television station contained 13.9 percent news and public affairs programming, 26.1 percent total nonentertainment programming, and 10.1 percent local programming. These figures represent a rise from 1973 in all reporting categories except local programming, which was

[35] All applicants for new television station licenses, proposed television assignees or transferees, and television renewal applicants submitting long form "audits" must file ascertainment information with the Commission. Each ascertainment study that is submitted to the Commission must be reviewed by the staff.

[36] We welcome further enumeration of the specific costs that commercial licensees incur in fulfilling their ascertainment obligations.

down from 10.5 percent in 1973. Individually, from the years 1973 to 1979, only 2.8 percent of the stations covered by the guidelines failed to present 5 percent informational programming, and 2.6 percent of the stations failed to meet the 10 percent total nonentertainment programming guidelines. However, 32 percent of the stations failed to meet the 5 percent local programming guideline, although 22.5 percent of these stations were UHF network stations.[37] Additionally, there are recent indications that commercial broadcasters are expanding their news and public affairs commitments in the face of increasing competition from emerging technologies.[38]

46. With respect to commercial practices, the staff conducted an analysis of 60 commercial television stations in Florida, Georgia, and Alabama.[39] This analysis shows that on the average, network affiliates presented just under 11 minutes of commercials per hour during weekdays. The average commercialization for the independent stations surveyed was approximately $8^1/_2$ minutes per hour. Over the entire survey, only four hours were found in which the 16 minute guideline was exceeded. This represents only 0.33 percent of the total broadcast hours for all 60 stations. A limited sample of commercial time during weekends showed that the average broadcast hour contained just over 7 minutes of commercials. These figures indicate, we believe, that market forces are acting to hold commercial practices far below the guidelines set out in our delegations. If, in fact, this is true, there may be no further utility in preserving those guidelines.

47. In addition to the statistical data set out above,[40] corroborative evidence exists to indicate that the commercial practices of television broadcasters have been, on the whole, reasonable. Based on a study conducted by the Children's Television Task Force, the Commission's staff concluded that broadcasters have generally abided by the Commission's commercialization policy with respect to children's programming. This has led the Commission to suspend its active consideration of children's television advertising practices. *See Children's Television Programming and Advertising Practices*, 45 Fed. Reg. 1976, para. 5, (January 9, 1980). Furthermore, the ever-decreasing number of commercial-related complaints lodged by television consumers reflects less viewer dissatisfaction with the

[37] Appendix B contains several Tables showing the extent to which commercial television stations have been meeting the current programming guidelines.

[38] *See, e.g.*, "TV Stations Expand Local Informational Programs as Competitive Weapons Against Cable's Intrusion," *TV-Radio Age*, October 19, 1981, p. 41; and "Indies Fighting Hard for News and Public Affairs Viewers," *TV-Radio Age*, August 10, 1981, p. 40.

[39] Appendix C contains a detailed narrative description of the staff survey. A copy of the survey is available for public inspection.

[40] We invite interested parties to submit any additional quantitative data on commercial broadcasters' programming and commercialization practices.

commercial practices of television licensees. *See Television Overcommercialization*, 49 RR 2d 391 (1981).

48. With respect to program logs, all commercial television licensees are required to complete and maintain a contemporaneous listing of all programs broadcast. The program type and source must also be set forth. Program logs must be maintained for a period of two years. Section 73.1840 of the Commission's Rules. As a general matter, program logs are not submitted to the Commission. However, for those renewal applicants selected to complete the long form audit, a copy of the program logs for a composite week must be submitted. These logs are perused by the Commission to determine whether the licensee has programmed in accordance with the promises made in its previous license application. The Commission also utilizes program logs on an *ad hoc* basis for special studies. For example, program logs were utilized by the staff in the preparation of the commercial time study cited in this *Notice*. According to a 1978 GAO report, the Commission's logging requirements constituted the largest government burden on business in terms of total hours per response and number of total burden hours.[41] According to our calculations, the burden currently imposed on commercial television licensees by our program log requirements exceeds 2,468,000 hours per year. Because the Commission's actual utilization of the program logs is minimal, it is possible that the burdens imposed by our present requirements may not be justified.

49. On the other hand, we are mindful that in the radio deregulation case, the court criticized the Commission for completely eliminating the program log requirements and replacing them with an issues/programs list. The court indicated that the Commission failed "to examine in an orderly fashion the information needs created by its revised scheme and the possible ways in which those needs may be met." *UCC* v. *FCC*, slip op. at 51. Accordingly, any decision on program logs cannot be made in a vacuum. Because we now are proposing to revise our regulatory scheme for television licensees, we think it entirely appropriate concurrently to consider our information needs and to reevaluate the present logging requirements.

## V. *PROPOSALS FOR DEREGULATION*

50. We now turn to the specifics of our deregulatory proposals. The following paragraphs explain in some detail the policy options which we are interested in pursuing. These options are by no means

[41] GAO, *Federal Paperwork: Its Impact on American Business*, pp. 43, 44 (1978). *But see* n. 32, *supra*.

exclusive, and commenting parties should feel free to fashion any other reasonable option for consideration.[42]

## *PROGRAMMING POLICY AND GUIDELINES*

51. Option I. *Community Issues Programming Obligation.* Under this option, television broadcast licensees would operate under a general obligation to address issues of concern to their communities of license. This programming obligation would be identical to that now required of commercial radio stations.[43] Accordingly, the Commission would no longer officially encourage through the use of processing guidelines the presentation of specific program categories. So long as a broadcaster presented programming reasonably calculated to address issues of concern to the community, the licensee's programming obligation would be met. In approving of this type of issue-responsive programming obligation for commercial radio stations, the court expressed its satisfaction that such a requirement is "faithful to and compatible with the Act, its legislative history, and subsequent judicial and administrative interpretations." Slip op. at 29.[44] The determination of community issues and decisions on how to address the issues would be left to the reasonable discretion of the broadcaster.

52. Under this option, the Commission would not routinely consider a licensee's programming at renewal.[45] The Commission would review a renwal applicant's programming in response to a petition to deny based on the failure of a licensee to present programming designed to address community problems.[46] Petitions to deny based on programming considerations would be expected to present specific facts demonstrating the failure of a licensee to

---

[42] Because we are considering such varied options, we are not following our usual procedure of including an appendix containing specific proposed amendatory language.

[43] Due to the multiplicity of formats and specialized audiences served by commercial radio stations, radio broadcasters under certain circumstances may be only responsible for responding to the needs and interests of their particular audiences. Certain television stations similarly may find it advantageous to direct their community programming to specific audiences. We seek comment on the appropriate circumstances in which television broadcasters might be entitled to specialize in the presentation of community-oriented programming.

[44] The court indicated that, at least for radio stations, this "bedrock" obligation was sufficient to meet the nonentertainment programming obligations imposed by the Act under the public interest standard. Commenters should indicate whether anything inherent in the nature of television broadcasting would lead to a different result for television licensees.

[45] We would, however, continue to require new applicants to supply a programming proposal for use in comparative proceedings when a programming issue is raised. We seek comments on the nature of the programming statement that might be required.

[46] This procedure comports with those applicable to commercial radio stations as established in the short form renewal and radio deregulation proceedings.

provide issue responsive programming. We note that the Commission is currently exploring the comparative renewal process in another proceeding.[47] Because we have proposed to eliminate program processing guidelines, those wishing to comment on the impact this action may have on our resolution of the comparative proceeding are invited to do so. In the interim we intend no departure from our present practice of designating specialized programming issues only where substantial or material differences exist between proposals. When a programming issue is raised in any context, the Commission's inquiry would focus on the licensee's presentation of issue oriented programming.

53. If this option were adopted, all of the programming delegations of authority would be eliminated. This would include not only the program content guidelines, but also the promise versus performance guideline. Sections 0.283(a)(8) and (a)(9), respectively. The guidelines would be replaced with a public file requirement expressing the Commission's record keeping requirements, whatever they ultimately might be. Programming issues raised in response to a petition to deny or in the context of a comparative proceeding still could be referred to the Commission on the authority of other existing delegation guidelines.[48] The Commission's programming policy would not be incorporated into the official rules, but would be the subject of a policy statement that would be included in the *Report and Order* in this proceeding.

54. Option II. *Retain Existing Programming Policies, but Amend Current Delegations*. This option anticipates the retention of the Commission's current programming policies as they apply to the encouragement of local, nonentertainment, and informational programming. Existing concepts of promise vs. performance utilized in the renewal context would not be amended. We might, however, based on commercial licensees' performance with respect to our individual programming delegations, reduce or eliminate particular programming categories. For example, the data discussed in Section IV of this *Notice* indicates that the vast majority of broadcasters comply with the guidelines covering informational and nonentertainment programming. Therefore, we may wish to ease those guidelines and allow a certain degree of program experimentation in those categories. This could be done by lowering the percentage standards in the delegations, or by permitting licensees to explain to the staff any proposal not meeting the guidelines. Allowing licensees to justify to the staff past performance already is permitted under the ascertainment and promise vs. performance guidelines. Similar treatment for initial programming proposals may encourage broad-

[47] *Notice of Inquiry*, 46 Fed. Reg. 55279 (November 9, 1981).

[48] *See, e.g.*, Sections 0.283(a)(10) and 0.283(b)(1) of the Commission's Rules.

casters to innovate and allow them more easily to compete with alternative technologies.

*ASCERTAINMENT*

55. Option I. *Eliminate the Ascertainment Obligations.* This option contemplates the complete elimination of our formal ascertainment obligation for commercial television licensees. The rationale for such an option embodies the notion that, because the video marketplace now is workably competitive, commercial broadcasters are forced continually to ascertain community needs and interests, and program in response to those needs and interests in order to remain viable. As stated earlier, failure to react properly to community issues may result in the ultimate sanction: a turn of the tuning dial. Ascertainment related questions would come up, if at all, only in the context of determining whether a licensee acted reasonably in determining which community issues to address in its programming. This approach was approved by the court for commercial radio stations. *UCC* v. *FCC*, slip op. at 41–46.

56. In assessing the continued utility of our ascertainment requirements in light of the increased competition facing commercial broadcasters, we are particularly interested in receiving comments on the costs of complying with existing regulations. As we noted previously, the comments submitted in our radio deregulation proceeding tended to show that the burdens imposed by our ascertainment obligations were significant. We wish to pursue a similar type of cost-benefit analysis with respect to commercial television ascertainment. Procedurally, this option would be implemented by deleting all references to ascertainment in the Commission's rules and abolishing the Primers.

57. Option II. *Retain Ascertainment Obligations without Specifying Procedures.* Under this option, each television licensee would be required to ascertain the needs and interests of its community of license and would be required to document its ascertainment effort. However, unlike our present procedures, licensees would be permitted to utilize any reasonable method in making their determinations. This option recognizes that the purpose of ascertainment is to guarantee an awareness on the part of the broadcaster of the community it serves. There may be an infinite variety of ways to carry out that purpose. Should this option ultimately be adopted, the Commission would not normally inquire into the licensee's ascertainment procedures absent a valid complaint that the licensee failed to meet its programming obligations. In relation to this option, we seek comment on whether the licensee should be required to place its ascertainment survey in its public file or regularly submit it to the Commission as part of each application.

## *COMMERCIALIZATION*

58. Option I. *Eliminate all Consideration of Commercialization.* At present, the primary reference in the Commission's rules to commercialization is the 16 minute per hour guideline found in the Mass Media Bureau delegations of authority. Section 0.283(a)(7). Under this first option, we would delete the commercial time delegations without replacing them with some other guideline or policy. Thus, the Commission no longer would consider in any fashion a television broadcaster's commercial load. This option is premised on the belief that competition within the video marketplace will serve as an adequate regulator of commercialization.[49] Also, this option would allow television licensees the utmost discretion in trying new or unconventional commercial techniques. This option thus would leave total discretion to the licensee, which, in turn, would answer only to its viewing public. With respect to radio station commercialization, the court has approved of this policy. *UCC* v. *FCC*, slip op. at 46–48.

59. Option II. *Amend the Delegations of Authority.* If we should decide to retain some direct oversight of television commercialization, we may choose to amend our delegations in an effort to give broadcasters more discretion and thereby encourage experimentation. An amended guideline might call for no more than 16 minutes of commercial matter for no less than 75 percent of the station's operating hours. In this manner, licensees would have total discretion for up to a quarter of their broadcast days to present commercial messages in any way they wished. Also, we could raise the number of minutes in our guideline to, perhaps, 20 minutes per hour. In that way, licensees would have greater leeway while the Commission would retain some power to deal with overcommercialization. Under this option, comments should focus on an appropriate commercial guideline that both encourages new applications of commercials and leaves the Commission some oversight authority.

## *PROGRAM LOGS/REPORTING REQUIREMENTS*

60. Our program logging requirements are, in part, intended as documentation of a licensee's programming and commercialization practices. Therefore, if our programming and commercialization policies are amended, retention of the present logging requirements might be unnecessary. As noted previously, the Commission is well aware of the court's concerns that some logging requirements may be needed to implement or oversee any newly adopted regulatory regime. However, we are also mindful of the fact that the GAO has

[49] The National Association of Broadcasters and the Justice Department have entered into a consent decree that discontinues the NAB commercial code. *U.S.* v. *National Association of Broadcasters*, 553 F.Supp. 621 (D.D.C. 1982). Commenters may wish to address how this action affects our proposals.

found our program logging requirements to be an exceedingly time-consuming and expensive burden on licensees. Therefore, interested parties are requested to assess the information collection needs of the Commission in light of the various substantive options listed above and the burdens such reporting might impose on licensees.

61. In the radio deregulation proceeding, we deleted our program logging requirements in favor of a reporting obligation taking the form of an issues/programs list that all radio broadcasters must complete during the year and place within the public file. This list includes up to ten important issues of concern to the community as ascertained by the licensee; how those specific issues were determined; and the programming presented that reasonably was calculated to address those community concerns. In *UCC v. FCC*, however, the court expressed some concern that, given the extensive shift in official Commission policy occasioned by the radio deregulation decision, the Commission had not given sufficient consideration to its new information collection needs. Slip op. at 51. Accordingly, the court remanded the program log portion of the radio deregulation decision and invited the Commission to reassess its present information needs. The Commission accommodated the court by seeking comment on an appropriate level of reporting and record keeping for commercial radio licensees. *Further Notice of Proposed Rule Making* in BC Docket No. 79-219 (*Deregulation of Radio* ), mimeo no. 33492, adopted June 29, 1983.

62. Among the options we wish to explore in this television deregulatory proceeding are those specifically listed in the above-referenced Further Notice. In that document, we stated that our tentatively preferred reporting option involved an exemplary issues/programs list plus some form of log specifying the date, time, duration and issue addressed for all those programs aired that are responsive to issues of concern to the community. We also indicated that the issues/programs list alone may be sufficient to oversee and implement our newly instituted policies. Parties may wish to comment on the specific record keeping requirements originally adopted in the radio deregulation proceeding and the propriety of applying those requirements— either solely or in addition to some logging requirement—to commercial television licensees. Alternatively, commenters may wish to address whether a revised program logging rule by itself would satisfactorily meet the Commission's information collection requirements. In presenting their views, parties should keep in mind the Commission's goal of carefully tailoring any reporting or logging rules to assure the collection of truly needed information while minimizing the burdens imposed on those submitting the information.

## *RELIANCE ON STATUTORY REQUIREMENTS*

63. In addition to the specific options addressed above, we also

seek comment on the option of relying in whole or in part on specific statutory requirements in determining whether licensees have met their public interest responsibilities. Under such a regulatory scheme, the Commission might no longer consider a licensee's programming or ascertainment activities in any context save whether that licensee complied with specific programming obligations set forth in the Communications Act and other statutes.[50] For example, applicants for new television stations might not present programming proposals, nor might programming considerations be grounds for petitions to deny the renewal of an existing station, except for showings that a licensee neglected its statutory obligations. Because programming would not be a subject of Commission consideration, programming issues would not be designated for determination in comparative application proceedings. Essentially, adoption of this option would leave total programming discretion to the individual licensee. Except for statutory requirements, this Commission no longer would make regulatory decisions based on programming. Parties are encouraged to comment on this approach to deregulation and to indicate whether such action appropriately might be taken on a national basis or only with respect to limited local markets exhibiting the greatest variety of competitive elements to the extent that competition is determined to be relevant to the action proposed herein. Finally, comment is solicited as to what effect this approach would have on other Commission processes, particularly the comparative renewal process.

## *OTHER OPTIONS*

64. Certainly the Commission is not rigidly bound by any statement made in this *Notice* when fashioning final programming and commercialization policies. Indeed, we intend to consider fully any other deregulatory proposals submitted in response to the *Notice*. Of course, for all of the four subject areas under consideration, after a thorough review of the record, we may choose to take no action whatsoever and leave our existing policies, rules, and guidelines intact. We invite comment on the benefits of retaining

[50] Programming requirements specifically imposed on broadcasters by the Communications Act of 1934, as amended, include: the reasonable access provision in Section 312(a)(7); the obligation to provide equal opportunities for political candidates in Section 315; and, the sponsorship announcement requirement in Section 317. Further, the Criminal Code (18 U.S.C.) prohibits the broadcast of lottery information, Section 1304; fraud schemes, Section 1343; and, obscene or indecent language, Section 1464. Additionally, electonic media subject to the Commission's jurisdiction, including broadcasting and cable television, may not be used to advertise cigarettes and small cigars. 15 U.S.C. § 1335. Finally, we note that some debate exists as to whether or not the Fairness Doctrine constitutes a statutory programming obligation under the terms of Section 315 of the Communications Act. *See Notice of Proposed Rule Making* in MM Docket No. 83-331, FCC 83-130 (adopted March 31, 1983).

these policies, rules and guidelines. Thus, the proposals we have presented represent the full range of options open to the Commission. Our final actions in this proceeding might fall anywhere along the regulatory policy continuum represented by these options.

## VI. *PROCEDURAL MATTERS*

*Regulatory Flexibility Act Initial Analysis.*[51]

65. Due to the ever increasing number of video delivery systems with which commercial television stations must compete and changing regulatory and philosophical attitudes about government intervention in the operations of business, the Commission believes that a complete review of commercial broadcasters' programming and commercialization obligations is appropriate. The options proposed herein, to varying degrees, are designed to permit commercial television broadcasters to compete freely with alternative media by allowing licensees more discretion in their programming and commercial practices. The proposals are also designed to lighten the reporting and paperwork burdens currently imposed on commercial television broadcasters. Third, the proposed actions would decrease the Commission's oversight of the affected entities, thus allowing the Commission to utilize more effectively its limited resources. These actions are proposed pursuant to Section 303(g) of the Communications Act of 1934, as amended, which charges the Commission to "... generally encourage the larger and more effective use of radio in the public interest." Although new reporting or record keeping requirements may be created, these new requirements should be substantially less burdensome than existing requirements. To our knowledge, there are no other federal rules that overlap, duplicate or conflict with this action.

66. The precise extent to which deleting our programming and commercialization guidelines might reduce licensee expenses or increase revenues is unknown. According to our estimations, elimination of the guidelines will reduce the paperwork burden on the industry by approximately 1,153 hours. The proposed amendments to our ascertainment and program logging requirements should substantially reduce licensee expenses. As reported in the radio deregulation proceeding, the ascertainment obligation for commercial radio stations cost, on the average, over $3,000 per year, and in some cases costs are as much as $20,000 per year. Because commercial television stations, in the main, are licensed to larger communities than commercial radio stations, we may assume that ascertainment expenses for the average television station are larger than for the average radio station. Thus, the savings incurred from

[51] This initial analysis is conducted pursuant to the requirements of Section 603(b) of the Regulatory Flexibility Act, 5 U.S.C. § 603(b).

our proposals may be greater than the above-listed figures for radio stations. We estimate that elimination of our ascertainment requirements would result in a 86,630 work hour reduction in the industry's present paperwork burden. Small businesses that provide consulting and research services in connection with the general public ascertainment surveys now conducted by commercial television stations may no longer be hired to provide these services. This could result in some loss of revenue to these small businesses. With respect to our program logging requirements, GAO reports that these rules constitute an enormous paperwork burden. A reduction in the program logging requirements could save the industry up to an estimated 2.46 million work hours. Although licensees may continue to maintain comprehensive program logs for their own purposes, minimizing our program logging requirements would substantially reduce government-imposed expenses for commercial television licensees. Some small entities that provide services and consultation to assist in station record keeping, and small entities that market necessary record keeping supplies and equipment may experience some loss of business.

67. Initially, we presume that any modifications to our existing rules and policies would apply to all commercial television licensees regardless of size. As to any options presented, however, commenters are expressly requested to specify whether, consistent with legal requirements in the Communications Act, appropriate exemptions or modifications might be made to minimize any significant economic impact on small entities.

*Rule Making Procedures*

68. Accordingly, the Commission adopts this *Notice of Proposed Rule Making* pursuant to the authority contained in Sections 4(i) and 303(g) and (r) of the Communications Act of 1934, as amended.

69. Pursuant to procedures set out in Section 1.415 of the Commission's Rules, interested parties may file comments on or before November 2, 1983, and reply comments on or before December 19, 1983. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

70. In accordance with the provisions of Section 1.419 of the Rules, formal participants shall file an original and 5 copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their interest by participating informally may do so by

submitting 1 copy. All comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters, Room 239, 1919 M Street, N.W., Washington, D.C. For general information on how to file comments, please contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

71. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's Rules.

72. For further information regarding this proceeding, contact Robert Ratcliffe, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

TABLE I

*Commercial TV Stations In Operation*

| *Year* | *Total* | *VHF* | *UHF* |
|---|---|---|---|
| 1945 | 6 | 6 | – |
| 1950 | 97 | 97 | – |
| 1955 | 439 | 294 | 117 |
| 1960 | 573 | 441 | 76 |
| 1965 | 586 | 487 | 99 |
| 1966 | 598 | 491 | 107 |
| 1967 | 620 | 497 | 123 |

TABLE I

*Commercial TV Stations In Operation*

| *Year* | *Total* | *VHF* | *UHF* |
|---|---|---|---|
| 1968 | 648 | 504 | 144 |
| 1969 | 675 | 506 | 169 |
| 1970 | 690 | 508 | 182 |
| 1971 | 696 | 511 | 185 |
| 1972 | 699 | 510 | 189 |
| 1973 | 700 | 511 | 189 |
| 1974 | 705 | 513 | 192 |
| 1975 | 711 | 513 | 198 |
| 1976 | 710 | 513 | 197 |
| 1977 | 728 | 517 | 211 |
| 1978 | 727 | 516 | 211 |
| 1979 | 732 | 516 | 216 |
| 1980 | 746 | 517 | 229 |
| 1981 | 756 | 519 | 237 |

Source: Television Factbook, Services Volume, 1981–82 Edition.

TABLE II

*Noncommercial TV's In Operation*

| *Year* | *Total* | *VHF* | *UHF* |
|---|---|---|---|
| 1955 | 9 | – | – |
| 1960 | 44 | – | – |
| 1965 | 88 | 54 | 34 |
| 1966 | 105 | 61 | 44 |
| 1967 | 118 | 67 | 51 |
| 1968 | 146 | 71 | 75 |
| 1969 | 172 | 76 | 96 |
| 1970 | 182 | 77 | 105 |
| 1971 | 196 | 85 | 111 |
| 1972 | 206 | 89 | 117 |
| 1973 | 229 | 91 | 138 |
| 1974 | 233 | 91 | 142 |
| 1975 | 241 | 95 | 146 |
| 1976 | 252 | 97 | 155 |
| 1977 | 256 | 101 | 155 |
| 1978 | 259 | 101 | 158 |
| 1979 | 260 | 102 | 158 |
| 1980 | 267 | 105 | 162 |
| 1981 | 282 | 111 | 171 |

Source: Television Factbook, Services Volume, 1981–82 Edition

TABLE III

*Estimated Growth Of The Cable Industry* *
(as of January 1 of each year)

| *Year* | *Operating Systems* | *Total Subscribers* |
|---|---|---|
| 1952 | 70 | 14,000 |
| 1953 | 150 | 30,000 |
| 1954 | 300 | 65,000 |
| 1955 | 400 | 150,000 |

TABLE III

*Estimated Growth Of The Cable Industry* *
(as of January 1 of each year)

| *Year* | *Operating Systems* | *Total Subscribers* |
|---|---|---|
| 1956 | 450 | 300,000 |
| 1957 | 500 | 350,000 |
| 1958 | 525 | 450,000 |
| 1959 | 560 | 550,000 |
| 1960 | 640 | 650,000 |
| 1961 | 700 | 725,000 |
| 1962 | 800 | 850,000 |
| 1963 | 1,000 | 950,000 |
| 1964 | 1,200 | 1,085,000 |
| 1965 | 1,325 | 1,275,000 |
| 1966 | 1,570 | 1,575,000 |
| 1967 | 1,770 | 2,100,000 |
| 1968 | 2,000 | 2,800,000 |
| 1969 | 2,260 | 3,600,000 |
| 1970 | 2,490 | 4,500,000 |
| 1971 | 2,639 | 5,300,000 |
| 1972 | 2,841 | 6,000,000 |
| 1973 | 2,991 | 7,300,000 |
| 1974 | 3,158 | 8,700,000 |
| 1975 | 3,506 | 9,800,000 |
| 1976 | 3,681 | 10,800,000 |
| 1977 | 3,832 | 11,900,000 |
| 1978 | 3,875 | 13,000,000 |
| 1979 | 4,150 | 14,000,000 |
| 1980 | 4,225 | 16,000,000 |
| 1981 | 4,375 | 18,300,000 |
| 1982 | 4,825 | 21,000,000 |

APPENDIX B

The following tables illustrate various percentages of news and public affairs programming, local programming and total nonentertainment programming for VHF network affiliates, UHF affiliates, VHF independents and UHF independents. Satellite stations were not included since they duplicate the parent station's programming and do no local programming of their own. All the data for these tables were compiled from FCC Form 303-A. Only the broadcast hours of 6 a.m. to midnight were used in this analysis. The years 1973–1979 are all inclusive as 1973 was the first year of collecting the data and 1980 data has yet to be processed.

*TABLE 1*
*Seven-Year Average for Each Group*

| | *Number of Stations* | *% News and Public Affairs* | *% Local* | *% Total Non-Ent.* |
|---|---|---|---|---|
| VHF Net. | 424 | 14.9 | 10.3 | 24.4 |

*The change in the number of systems operating each year is determined by three factors: (1) New systems which began operation during the year. (2) Older systems coming to the attention of Television Factbook for the first time and therefore included in the total for the first time. (3) The splitting or combining of systems by operators. Source: Television Factbook, p. 83A, 1981-82 Edition.

*TABLE 1*

*Seven-Year Average for Each Group*

| | *Number of Stations* | *% News and Public Affairs* | *% Local* | *% Total Non-Ent.* |
|---|---|---|---|---|
| VHF Ind. | 30 | 9.9 | 15.8 | 19.1 |
| UHF Net. | 115 | 12.5 | 7.0 | 22.6 |
| UHF Ind. | 69 | 8.2 | 14.0 | 28.9 |
| All Stations | 638 | 13.7 | 10.3 | 24.3 |

*Table 2*

*Seven-Year Trend for VHF Affiliates*

| | *Number of Stations* | *%News and Public Affairs* | *% Local* | *%total Non Ent.* |
|---|---|---|---|---|
| 1973 | 420 | 14.4 | 10.5 | 23.6 |
| 1974 | 428 | 14.2 | 10.6 | 22.8 |
| 1975 | 423 | 15.7 | 10.5 | 25.6 |
| 1976 | 424 | 14.8 | 10.0 | 24.5 |
| 1977 | 424 | 15.1 | 10.0 | 24.5 |
| 1978 | 426 | 14.8 | 10.0 | 24.6 |
| 1979 | 425 | 15.5 | 10.2 | 25.3 |

*Table 3*

*Seven-Year Trend for VHF Independents*

| | | | | |
|---|---|---|---|---|
| 1973 | 29 | 9.6 | 17.9 | 20.6 |
| 1974 | 29 | 9.8 | 18.0 | 17.8 |
| 1975 | 30 | 10.4 | 16.2 | 18.7 |
| 1976 | 28 | 10.4 | 15.3 | 19.0 |
| 1977 | 31 | 10.2 | 14.6 | 20.0 |
| 1978 | 30 | 9.8 | 14.5 | 19.4 |
| 1979 | 30 | 9.1 | 14.6 | 18.3 |

*Table 4*

*Seven-Year Trend for UHF Affiliates*

| | | | | |
|---|---|---|---|---|
| 1973 | 109 | 12.1 | 7.6 | 20.5 |
| 1974 | 114 | 11.3 | 7.2 | 19.0 |
| 1975 | 112 | 13.2 | 7.0 | 22.8 |
| 1976 | 116 | 12.5 | 6.9 | 22.7 |
| 1977 | 117 | 12.7 | 6.7 | 23.6 |
| 1978 | 118 | 12.3 | 6.9 | 23.9 |
| 1979 | 118 | 13.2 | 7.1 | 25.0 |

*Table 5*

*Seven-Year Trend for UHF Independents*

| | | | | |
|---|---|---|---|---|
| 1973 | 53 | 7.0 | 13.4 | 18.2 |
| 1974 | 61 | 7.8 | 15.1 | 22.1 |
| 1975 | 64 | 9.0 | 15.0 | 25.8 |
| 1976 | 69 | 9.0 | 15.0 | 29.3 |
| 1977 | 73 | 9.8 | 14.6 | 31.5 |
| 1978 | 74 | 7.5 | 12.9 | 32.8 |
| 1979 | 90 | 7.4 | 12.9 | 34.6 |

*Table 6*
*National Average for Each Year*

| | *Number of Stations* | *% News Public Affairs* | *% Local* | *% Total Non-Ent.* |
|---|---|---|---|---|
| 1973 | 611 | 13.3 | 10.5 | 22.6 |
| 1974 | 632 | 13.0 | 10.6 | 21.8 |
| 1975 | 629 | 14.5 | 10.5 | 24.8 |
| 1976 | 637 | 13.7 | 10.1 | 24.4 |
| 1977 | 645 | 13.9 | 10.1 | 24.8 |
| 1978 | 648 | 13.4 | 9.9 | 25.0 |
| 1979 | 663 | 13.9 | 10.1 | 26.1 |

*Table 7*

Frequency Distribution by Type of Station for Three Program Categories—A Seven-Year Average (1973-1979)

| | News and Public Affairs | | | | Local Programming | | | | Total Non-Entertainment | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| % Of Broadcasting Hours | VHF Net. | UHF Net. | VHF Ind. | UHF Ind. | VHF Net. | UHF Net. | VHF Ind. | UHF Ind. | VHF Net. | UHF Net. | VHF Ind. | UHF Ind. | |
| 0–4.9 | 0.2 | 0.7 | 1.9 | 39.5 | 4.2 | 22.5 | 5.3 | 27.9 | 0.0 | 0.0 | 0.0 | 1.0 | |
| 5–9.9 | 5.3 | 18.7 | 55.1 | 36.0 | 49.2 | 64.6 | 20.8 | 28.9 | 0.3 | 0.9 | 1.4 | 7.0 | below guidelines |
| 10–14.9 | 46.7 | 62.2 | 35.7 | 11.2 | 34.4 | 11.3 | 33.8 | 12.4 | 2.2 | 5.2 | 19.8 | 20.5 | |
| 15–19.9 | 42.2 | 18.0 | 6.8 | 5.0 | 10.0 | 1.2 | 14.5 | 7.2 | 12.2 | 24.5 | 44.0 | 17.8 | |
| 20–24.9 | 5.4 | 0.4 | 0.5 | 2.1 | 1.9 | 0.4 | 5.3 | 6.4 | 41.3 | 39.6 | 20.8 | 9.9 | |
| 25–29.9 | 0.3 | - | - | 1.0 | 0.2 | - | 10.6 | 3.7 | 34.5 | 24.0 | 11.1 | 8.7 | |
| 30–34.9 | - | - | - | 1.0 | - | - | 5.3 | 2.5 | 8.4 | 4.1 | 1.4 | 4.3 | |
| 35–39.9 | - | - | - | 1.0 | - | - | 1.9 | 1.7 | 1.0 | 1.4 | 0.5 | 4.8 | |
| 40+ | - | - | - | 2.5 | - | - | 1.5 | 9.3 | 0.1 | 0.4 | 1.0 | 26.0 | |

## APPENDIX C

### *Analysis of Commercial Time*

An analysis was conducted of the number of commercial minutes aired on all commercial television stations in Florida, Georgia, and Alabama. These states were chosen because they were in the most recent license renewal periods and their program logs were thus readily available.

A number of other stations were in the two renewal groups under consideration but were not included in the sample because of their particular circumstances. Puerto Rico and the Virgin Islands fell into the same renewal period as Florida, but were not included in the analysis because we did not consider their stations to be representative of mainland stations.

Of the 60 stations which were included in the three-state sample, 55 were network affiliates and five were independents. In addition, there were several additional stations that were operating with construction permits but had not been fully licensed and, therefore, did not submit renewal forms with program logs. Finally, there was one religious station that had no commercials. As a consequence of these various situations, these stations were not included in our analysis.

For analytical purposes, one day of the composite week, Thursday, was randomly chosen. In addition to this basic analysis, a small sample of weekend commercial time was separately analyzed. Results from that analysis also are discussed.

*Commercial Time of Network Affiliates*

An analysis of the entire broadcast day (sign-on to sign-off) showed that the 55 network affiliates in the sample averaged just under 5 minutes of local commercials per braodcast hour.[1] When the network average of about 8 minutes, 30 seconds of commercials per hour of network programming is added to this local commercial figure, a combined average of 13 minutes 30 seconds of total commercial time during network programming is reached.[2] Of course, this is an overstatement of the true average for the entire broadcast day because the amount of commercial time varies throughout the day and is less on average during non-network hours.[3] For example, during prime time the NAB code suggests a 9 minute, 30 second limit on commercial matter.[4] It is during prime time that the networks average about 6 minutes of

[1] In total, stations averaged 100 minutes, 20 seconds of local commercials for the broadcast day. This sum divided by an average of 20 hours, 15 minutes of air time per station yields an average of 4 minutes, 57 seconds per hour.

[2] There was an average of about 14 hours of network programming by each network for the randomly selected Thursday. The average amount of commercial time on a network for that day was 119 minutes, 50 seconds. Therefore, the average per hour was 8 minutes, 30 seconds.

[3] Station program logs have two purposes - engineering and billing. They inform engineering personnel when to air broadcast material and act as transcripts of commercial record keeping for billing. As such, there is no need to log or be aware of commercials that are within blocks of pre-recorded syndicated programming or programming sent down to affiliates from the networks. Consequently, logged commercial time during any broadcast hour that included syndicated programming may not reflect total commercial time. However, commercials that are network originated but not logged by stations have been determined from documents which the networks supplied to their affiliated stations and are accounted for in this study.

[4] We realize the NAB commercial code has been suspended. However, it was in effect during the studied stations' most recent license terms.

commercials and the affiliate typically adds about one minute, 30 seconds of their own commercials, thereby not exceeding the guidelines set by NAB. When affiliates are clearing network programming, there is an inverse relationship between the amount of time devoted to network originated commercials and local commercials so that neither the NAB nor FCC guidelines will be exceeded. In other words, as more time is accounted for by network commercials, less time can be apportioned to local commercials since the station must not exceed an upper constraint of either 9 minutes, 30 seconds for NAB's prime time limit nor the FCC guideline of 16 minutes.

Another approach to deriving the amount of commercial time aired by the affiliates in our sample and one which may give a more accurate estimate is to consider the typical network affiliate commercial make-up. As discussed earlier this type of station airs an average of 100 minutes, 20 seconds of local commercials per day; clears an average of 119 minutes, 50 seconds of network commercial minutes, and broadcasts an average of 20 hours, 15 minutes per day. By adding the average number of local commercial minutes aired by an affiliate per day to the average number of network commercial minutes per day and then dividing by the average number of broadcast hours by an affiliate per day, the resulting figure of about 10 minutes, 52 seconds of commercials per hour is reached.[5]

By actually adding the number of network commercial minutes to logged local commercials from each station's Thursday log, it was found that two CBS affiliates were 1 minute, 10 seconds over 16 minutes in the same hour. This occured when both had a half hour of local news and then aired the first half hour of the CBS late night movie. Another affiliate was 40 seconds over the limit during the 6–7 pm slot when broadcasting local news and an episode of MASH.

*Commercial Time of Independents*

In examining logs of the five independent stations in the sample, there was only one hour where the amount of commercial time exceeded 16 minutes. WLTV, a specialty station in Miami, logged 16 minutes, 20 seconds for one hour of the sampled Thursday. There was no other single hour of an independent's time that approached 16 minutes per hour. In fact, the next highest count was 13 minutes, 30 seconds for one hour. The average for the five independents for the entire broadcast day was 8 minutes, 36 seconds per hour.[6] This is significantly less than the 10 minutes, 52 seconds per hour average found for affiliates.

The four hours where the 16 minute limit was exceeded (3 on affiliates and one on an independent) represent 0.33% of the total broadcast hours for all 60 stations. In other words, 99.67% of all broadcast hours were within the guidelines. This result is comparable with recent NAB data that showed that of over 71,000 broadcast hours monitored, 99.84% were within NAB guidelines.[7] The sample used by NAB was almost 60 times larger than the one used in our analysis yet the percentages are quite close. Both figures are higher than the data compiled for the radio deregulation effort which showed that 98.71% of the hours observed contained a quantity of commercials less than the 18 minute commercial guideline for radio.[8]

*Weekend Commercial Time*

The commercial time aired by a seven station sample of network affiliates was

[5] Mathematically: $\frac{(100 \text{ min., } 20 \text{ sec.} + 119 \text{ min. } 50 \text{ sec.})}{20 \text{ hours, } 15 \text{ minutes}} = 10.87 \text{ min./hr.}$

[6] One independent in the sample operated in an STV mode for a portion of the day. Those pay broadcast hours were not included in determining the average.

[7] Source: NAB Code Authority.

[8] FCC Public Notice, January 11, 1980, Report No. 15448, Table 24.

compiled and revealed an average of only 62 minutes, 48 seconds of local commercial minutes per day. This figure is substantially lower than the average of 100 minutes of local commercials per affiliate for the Thursday used in the weekday sample. Similary, the networks averaged only 77 minutes, 25 seconds of commercials on either Saturday or Sunday. This is also substantially lower than the Thursday average of 119 minutes, 50 seconds. Given that both the network and local commercial minute totals are lower on the weekends, the likelihood of any commercial overages occurring is minimal. In fact, the average number of commercial minutes per hour for the weekend sample is about 7 minutes, 9 seconds as compared to about 11 minutes per hour for Thursday.

## *SEPARATE STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON*

This rulemaking[1] gives the Commission a tremendous opportunity to take significant steps towards the elimination of Commission-generated policies.

In particular, I view the comments in three areas as critical:

(1) *Description of the Video Market.* If the Commission is to rely in whole or in part on "competition" in the video market as a rationale for significant television deregulation, then it is important to have a clear idea as to what that market is. Thus, it is significant that the Commission asks for comments on the scope of both the product and geographic markets for television and whether the relevant geographic market should be viewed primarily as a local or a national market. *NPRM* at para. 23. This information will be especially important since it will potentially impact the Commission's approach to ownership issues as well.

(2) *Alternative Rationales.* It is also critical that this rulemaking essentially asks whether the Commission must find a "competitive" market, as it did in the radio deregulation decision,[2] in order to take the deregulatory steps which the NPRM proposes. I am not convinced that "competition" must be the exclusive basis for deregulation,[3] and in this regard, the NPRM proposes several alternative theories which may form the basis for a decision deregulating television.[4] The most promising of these alternative

[1] Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 94 F.C.C. 2d ___ (FCC 83-313, adopted June 29, 1983) [hereinafter *NPRM*].

[2] Deregulation of Radio, 84 F.C.C.2d 968 [hereinafter *Radio Deregulation*] *reconsideration granted in part*, 87 F.C.C.2d 797 (1981), *aff'd in part and remanded in part sub nom.* Office of Communication of the United Church of Christ v. Federal Communications Comm'n, ___ F.2d ___ (D.C. Cir., May 10, 1983) [hereinafter *Radio Deregulation Appeal*].

[3] For example, the Commission did not rely on "competition" in its decision exempting small-market radio and television licensees from formalized ascertainment procedures. Ascertainment of Community Problems by Broadcast Applicants, 78 F.C.C.2d 444 (1980), *modified* 86 F.C.C.2d 798 (1981), *aff'd sub nom.* National Black Media Coalition v. Federal Communications Comm'n, 706 F.2d (D.C. Cir. 1983).

[4] Among the alternative rationales are: (1) the burden of conventional television

rationales seems to be a straightforward cost-benefit analysis. *NPRM* at para. 38. Quite simply, if the subject rules and policies do little or nothing to advance their various goals, then they would be likely candidates for elimination, especially where the costs to broadcasters are substantial. *Id.* It will undoubtedly be important for commenting parties to consider not only the paperwork burdens imposed by the subject rules and policies but also such burdens as reduced editorial discretion and licensee flexibility. *Id.*

(3) *Option of Reliance on Statutory Requirements Alone.* Most important, this NPRM asks whether and to what extent the Commission may rely on the relevant statutory requirements of the Communications Act rather than on Commission-imposed obligations.[5] In essence, the NPRM asks whether the time may have come for a return to the regulatory basics of the Act and for the repudiation of the regulatory baggage that the Commission—not the Communications Act—has imposed on television broadcasters.

Such an approach, in my reading of the Act, would mean that: (1) there would be no requirement to ascertain communities of license; (2) there would be no commercialization standards; (3) there would be no requirement for certain kinds of programming, except for those required by the Act, particularly Sections 312(a)(7) and 315 of the Act, 47 U.S.C. §§ 312(a)(7), 315 (1976);[6] and (4) there would be no

---

regulation vis-a-vis other video delivery technologies, *NPRM* at para. 35; a Congressional policy against "over-regulation," *NPRM* at para. 36; and the impact of regulation on First Amendment values, *NPRM* at para. 37.

[5] The subject rules and policies present a remarkable history of regulatory accretion. For example, neither the Radio Act of 1927 nor the Communications Act of 1934 contained explicit requirements that broadcast stations present particular kinds of programs or that they ascertain their local communities. In fact, except for the gradual development of the Fairness Doctrine, *see* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247–48 (1948), both the Radio Commission and the Communications Commission avoided the erection of "a rigid schedule specifying the hours or minutes that may be devoted to one kind of programming or another," *Federal Radio Comm'n, Annual Rep't* 32 (1929). However, in 1960 the Commission imposed an affirmative obligation on broadcasters to provide programming to their communities in response to the ascertained needs and interests of the community and, in fact, listed 14 program types "usually necessary to meet the public interest, needs and desires of the community." En Banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960). In 1973, despite its previous statements, the Commission added a 10 per cent informational programming "guideline" for the staff in acting on applications. Amendment of Part O of the Commission's Rules, 43 F.C.C.2d 638 (1973). And in 1975, the Commission decided that all applications proposing less than five per cent "local" and less than five per cent "informational" programming should be referred to the Commission for action. Amendment to Section 0.281 of the Commission's Rules, 59 F.C.C.2d 491 (1976). Thus, in less than 40 years, the Commission has gone from the generalized requirement of the Fairness Doctrine that licensees cover various views on controversial issues of public importance to a system whereby the federal government prescribes the types—and in some cases the amounts—of programming for broadcast licensees.

[6] If the Commission ultimately chooses to rely in whole or in part on statutory

program log requirement, except for those logs necessary to assure compliance with statutory programming obligations.[7] Obviously, this approach would go further than the FCC was willing to go in the radio deregulation decision, where the Commission replaced formal programming and ascertainment requirements with more general standards.[8] However, it should be noted that a similar approach was proposed in the radio deregulation NPRM although it was not finally adopted.[9]

My initial reaction is that the statutory approach has much to commend itself to the Commission, the television industry and, most important, the American public. First, such an approach would avoid the largely ritualistic regulatory burdens imposed by the Commission for no particular statutory reason. Moreover, it has become painfully clear in recent years that concepts such as ascertainment and generalized programming requirements have grown to encumber other Commission processes, particularly the Commission's comparative process. In addition, they clearly impinge on broadcasters' First Amendment choices. Finally, a statutory approach would avoid what I view as a critical failing of the radio deregulation decision: the replacement of specific ascertainment and programming guidelines with amorphous ones.[10]

I do not accept the view that the current FCC may do no more

---

compliance, it will be necessary to know exactly what is required by the Communications Act and what is not. *See* NPRM at n.50. To the extent that the Fairness Doctrine is found to be statutory, see *id.*, the obligation to present differing views of controversial issues of public importance would, of course, survive should the Commission opt for the statutory approach.

[7] *See Radio Deregulation Appeal*, sl. op. at 48–56. *See also Radio Deregulation*, 48 Fed. Reg. 33499 (1983), (FCC 83–311).

[8] The radio deregulation decision is perhaps more accurately denominated radio "reregulation" since its primary effect seems to have been the reformulation of Commission-imposed standards rather than the elimination of such standards. In fact, Commissioner Fogarty concurred in the decision "not because it 'deregulates' radio—it does not—but because it rationally refines the public interest obligations of radio station licensees in light of the contemporary reality of the radio marketplace." *Radio Deregulation* at 1119 (concurring opinion).

[9] Deregulation of Radio, 73 F.C.C.2d 457, 529–32 (1979).

[10] The transmutation of vague ascertainment guidelines into specific ascertainment requirements should be instructive to the Commission as it approaches deregulation. In 1960 the Commission found that broadcast licensees were obligated "to make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community" En Banc Programming Inquiry, 44 F.C.C. at 2314. After several years of case law development, the Federal Communications Bar Association asked for some "clarification" of the Commission's standard, and the Commission obliged with numerous, specific rules regarding ascertainment. Ascertainment of Community Problems, 27 F.C.C.2d 650 (1971). It was the ritual of that clarification that the Commission largely repudiated in the radio deregulation decision as it returned to a standard of allowing radio licensees to ascertain "by any reasonable means." *Radio Deregulation* at 993. It takes no great analytical skill to discern a disturbing pattern here, and I hope that our decision in this proceeding will do something more than start a similar metamorphosis.

with regard to television deregulation than retrace the steps of a prior Commission with regard to radio deregulation. Courts have consistently recognized that the Commission, as an expert regulatory agency, is entitled to great deference in its policy decisions[11] and that its statutory construction should be followed unless clearly incorrect.[12]

In this regard the *WNCN* case[13] is particularly instructive. There, the Court reversed an appeals court decision that the Commission was statutorily obligated to review certain entertainment format changes of broadcast stations. The Court found that the Commission had made a "reasonable explanation" of its preference not to inquire into entertainment format changes, 450 U.S. at 603, and stated:

> As we read the legislative history of the Act, Congress did not unequivocably express its disfavor of entertainment format reviewed by the Commission, but neither is there substantial indication that Congress expected the public-interest standard to *require* format regulation by the Commission. The legislative history of the Act does not support the Court of Appeals and provides insufficient basis for invalidating the agency's construction of the Act.

450 U.S. at 597–98 (emphasis in original). Similarly, in the instant situation, nothing in the Act appears to *require* the Commission to impose ascertainment and informational programming obligations on broadcasters. Accordingly, assuming the Commission could provide a reasonable explanation of its action, nothing appears to keep the Commission from relying exclusively on the strictures of the Act in this area.

Similarly, I find nothing in a statutory approach which is necessarily inconsistent with the court's decision in the radio deregulation appeal. Indeed, the court specifically noted that the Commission's original "preferred approach" had been "to rely totally on the market and the decisions of individual licensees to set the amounts and types of nonentertainment programming." *Radio Deregulation Appeal*, sl. op. at 23. However, since the FCC did not ultimately adopt this approach, the court stated no opinion on it, finding that it "need not consider whether the Act would permit the Commission to rely solely on market forces in the area of nonentertainment programming." *Id.* at 23, n. 34.

In short, I see no reason why the Commission may not view the radio deregulation decision as a point of departure rather as an absolute limit. And my initial reaction is that reliance on statutory requirements rather than Commission-generated standards is the

---

[11] *E.g.*, Federal Communications Comm'n v. National Citizens Committee for Broadcasting, 436 U.S. 775, 810 (1978).

[12] *E.g.*, Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 381 (1969).

[13] Federal Communications Comm'n v. WNCN Listeners Guild, 450 U.S. 582 (1981)

best hope of bringing significant deregulatory relief to television licensees and more diverse program choice to the American people.

## CONCURRING STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Notice of Proposed Rulemaking to Revise Commercial Television Licensing Policies.

My concurrence in this Notice of Proposed Rulemaking is premised on the belief that the Commission should periodically reexamine its policies and procedures to see whether they can be improved. Most of the guidelines, policies and rules under study here have not been comprehensively revisited—as they apply to commercial television—for a decade or more.[1] Therefore, although I emphatically disagree with the Notice's suggestion that the television industry is ripe for substantial deregulation, I do not object to its issuance because the options outlined specifically include proposals that would improve, rather than eliminate, the existing regulatory structure.

Despite this acquiescence, I differ fundamentally with the reasons given for launching this broadly-gauged review. My objections are detailed at greater length below. Initially, however, it bears emphasizing that regardless of how this proceeding may be publicly characterized, it does not, and could not, propose complete television deregulation. *That* is possible only by legislation. Recent judicial decisions confirm that licensees remain, by law, public trustees, whose fiduciary status carries with it binding public service obligations.[2] As the court of appeals has once again confirmed:

> The regulatory scheme that Congress envisioned for the broadcast industry was a unique hybrid of private sector ownership of the broadcast licenses tempered by public service responsibilities; in return for "free and exclusive use of a limited and valuable part of the public domain," broadcasters were to be "burdened by enforceable public obligations."[3]

These public obligations may not be nullified by the philosphical predilections of this or any other Commission. Thus, any revision of the existing regulatory scheme must retain rational procedures to measure a licensee's service to the public. It must also preserve the public's opportunity to contribute meaningfully to our licensing decisions. The right of citizens to participate in our statutory public

[1] Although some regulations function so effectively that their review by notice and comment would be wasteful, I cannot unequivocally vouch for the efficacy of regulations under study in this Notice.

[2] *See Office of Communication of United Church of Christ* v. *FCC*, No. 81–1032 (D.C. Cir. May 10, 1983) (*"UCC* v. *FCC"*); *Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982).

[3] *UCC* v. *FCC*, *supra*, slip op. at 24–25 (citation omitted).

interest determinations is a "crucial" safeguard, one which the Commission may not indirectly undermine.[4]

Some of my fellow commissioners are apparently inclined to defer oversight of the television industry "to the marketplace" except where the Communications Act expressly requires otherwise.[5] In my judgment, pursuing that course before recently planted seeds of new competition fully mature, even if it could be legally justified, would work a profound disservice on the television viewers of this country, and could only be perceived as reflecting gross indifference to our mandate to regulate "for the benefit of the public, not for incumbent broadcasters."[6] Common sense and experience confirm that the two sets of interests are *not* always synonymous, and that the broader public interest will not be fully satisfied in the existing television marketplace absent continued selective regulatory involvement.[7] Any action ceding substantial new discretion to television licensees must be scrutinized closely to ensure that it does not undermine the public's interest *sub silentio*.

With these principles firmly in mind, I turn to my specific problems with the Notice. The Commission sets forth three primary arguments for reducing television regulation. The first two are wholly unpersuasive. The Notice suggests that: (1) growing competition in the television marketplace may offer an effective substitute for attaining the goals underlying FCC regulations; (2) regardless of the competitive condition of the television industry, our policies disadvantage licensees in competing with other, less regulated video services; and (3) in any event, existing federal policy disfavors burdensome and costly regulations.

As for the first contention, it is undeniable that television is a competitive industry; that has long been the case. However, in premising any fundamental policy shift on the degree of competition in television broadcasting, the Commission must have evidence that there has been a substantial increase in the number of outlets

---

[4] *Id.* slip op. at pp. 52–53.

[5] It is difficult to respond fully to the proposal that the Commission forswear all behavioral regulation except where required by statute, *see* para. 63, since the Notice advances neither policy nor legal support for this dramatic regulatory shift. However, it is worth observing that the FCC has already rejected such an approach for radio as administratively unworkable and of dubious legality. *See Deregulation of Radio*, 84 FCC 2d 968, 1022, 1069–71 (1981). The likely success of implementing in television what was just rejected for radio—after extensive study and public comment—is dim indeed. Consequently, I see no constructive public purpose to be served by inviting comment on the issue.

[6] *Central Florida Enterprises, Inc.* v. *FCC*, *supra*, 683 F.2d at 507.

[7] *See generally Notice of Proposed Rulemaking In the Matter of Children's Television Programming and Advertising Practices*, 75 FCC 2d 138 (1980) (inviting comment on task force findings that industry's self-regulatory efforts have failed and that public demand for additional children's programs is unlikely to be met in the present marketplace absent direct regulatory intervention).

competing for the local television viewer. Only then can we plausibly assert that spectrum scarcity—the longstanding rationale for content-related regulation—has been reduced to such an extent that the FCC can largely rely on competitive market incentives to ensure that all major programming needs are satisfied and that all significant issues are aired.

Judged by that standard, it cannot be demonstrated that today's video market is fundamentally different, *nationwide*, than it was ten or twenty years ago.[8] Nevertheless, the Notice is somewhat schizophrenic about the present level of competition in television. On the one hand, it frankly acknowledges that recent FCC efforts to expand television viewing alternatives nationwide have not yet advanced much beyond regulatory fantasy; on the other, it suggests that a "burgeoning multitude" of video sources is spurring television licensees to render the most desirable program service. Whatever position the Notice means to espouse, it does not, nor could it, rebut the fact that conventional over-the-air television continues as the dominant video medium for a majority of the public. In other words, while the prospects for greater diversity seem bright, the choice of video service available to most Americans today is scarcely wider than it was before most of these rules and procedures were adopted.[9] One need only witness the recent astronomical sales prices of major market television stations—both VHF and UHF—to confirm that scarcity of television signals is still very much with us today.

The Commission's appraisal of the competitiveness of the existing video marketplace would have been considerably aided, and the necessity for comment on the issue substantially foreshortened, by meaningful consideration of the detailed report published just 18 months ago by the House of Representatives' Subcommittee on Telecommunications, Consumer Protection and Finance. That study is the most comprehensive assessment of competition in television performed outside the FCC. The Notice's failure to address these findings lends credence to the view that the Commission's bottom line in this proceeding is predetermined. After exhaustive factual,

[8] It is true that some markets boast a multitude of video services, including VHF and UHF television, cable and STV. However, those markets are the exception rather than the rule. Where there is robust competition among numerous competing firms and types of service, more significant deregulatory measures may well be called for. *See* U.S. House of Representatives Committee on Energy and Commerce, *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry*, 97th Cong. 1st Sess. 374–76 (1981). On the other hand, the Commission cannot take broadly based deregulatory steps today premised on the hope or expectation that a multiplicity of video outlets will develop tomorrow.

[9] At this time, cable systems provide the only significant alternative to over-the-air television. And although cable penetration has deepened impressively in the last decade, cable television is still available in only about one-third of this nation's homes.

economic and policy analysis, the Subcommittee concluded that despite the advent of increased choices in some markets, "[i]f the argument for deregulation of television broadcasting is that the competitive infusion of the new technologies has overcome a pre-existing scarcity, thus reducing or eliminating the former's position of market dominance, the argument must fail."[10] The Subcommittee's conclusions are amply supported by an extensive record and I fully concur in its judgment that "the burden falls on those who urge deregulation in the absence of sufficient competition to demonstrate how the public interest will be protected."[11] The analysis set forth by the Commission in this Notice falls woefully short on this score.

Unlike commercial radio, where since 1965 the number of outlets has swelled by several thousand to a current total of nearly 9,000 stations, the ranks of commercial television licensees have increased by roughly two hundred (to approximately 800 stations) during the same period. Although 90 percent of the public receives at least four television signals, that is hardly the abundance witnessed in radio, where the number of outlets exceed outstanding television authorizations by a factor of ten.

The Commission's radio deregulation rulemaking noted fundamental structural differences between television and radio. Those distinctions still exist. For example, the FCC recognized that while both radio and television were part of a larger information market, the television industry's growth has been far more limited due to considerable technical constraints.[12] The Commission also found that in contrast to the pronounced trend toward specialization in radio, the economics of television encourage licensees to offer broad, common denominator programming, thus diminishing their capacity to respond to specialized needs.[13] Finally, the Commission observed that in sharp contrast to radio, television has achieved a prominent, if not paramount, role in informing and educating our society.[14]

In view of the significant differences between television and radio, any attempt to pattern "television deregulation" after our radio deregulation order could be achieved after only the most searching analysis. However, this Notice scarcely acknowledges the existence

---

[10] U.S. House of Representatives Committee on Energy and Commerce, *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry*, 97th Cong. 1st Sess. 375–76 (1981).

[11] *Id.* at 376.

[12] *See In the Matter of Deregulation of Radio*, 73 FCC 2d 457, 484–86 (1979).

[13] *Id.*, 73 FCC 2d at 486–87.

[14] Television may well be the primary source of news and information for most Americans, who rely on it for exposure to issues of local and national importance. *See* 73 FCC 2d at 486. Any action reducing Commission oversight of television must be especially sensitive to this fact and must be calculated to preserve undiminished the public's access to "diverse social, political, aesthetic, moral and other ideas. *See Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 390 (1969). This Notice unfortunately reflects no such insight or sensitivity.

of distinctions between the two media, tersely observing that "[i]nterested parties may wish to comment on whether these [unspecified] differences should affect our thinking with respect to amending our commercial television rules and policies." *See* Notice at para. 34.

The Notice's second premise — that these policies and rules are ripe for review because they hinder licensees' ability to compete with less regulated media forms — is little more than a paper tiger. As the Notice concedes, neither DBS nor LPTV is now a reality, nor is there any prospect for their becoming widely available in the immediate future.[15] The same is true of STV and MDS, neither of which presently reaches more than one million viewers. Accordingly, there can be no material competitive disadvantage as far as these services are concerned. Cable television, the only service that has made competitive inroads into the broadcast television market, is not subject to the identical panoply of rules applicable to broadcasters, but is often more extensively regulated by local franchise authorities. Thus, to the extent there are disparities between cable and broadcast regulation, they are not likely to dampen television licensees' incentive to compete and to innovate; in any event, the Notice has made no case to the contrary.

The final argument for revisiting these rules — the growing federal policy against overregulation — is the only persuasive basis supplied for going forward.[16] Over time, our administrative interven-

[15] The Notice's apparent concern over the competitive injustice resulting from the fact that DBS and LPTV are mimimally regulated is seriously misguided. In each case, the Commission's rationale for refraining from detailed regulation was carefully tailored to the unique attributes of the service being authorized. With respect to DBS, we concluded that it would be inappropriate to subject a service of unknown viability to extensive regulation during the initial "experimental" period; however, the Commission committed to revisit the matter before adopting permanent regulatory policies. *See Direct Broadcast Satellites*, 90 FCC 2d 676 (1982). The viability of LPTV is similarly undetermined, and the sharply limited range and preemptible status of those stations render them, at best, supplements to conventional television service. *See Low Power Television Service*, 51 RR 2d 476 (1982). Having couched its regulatory judgments in these limited terms, it would be disingenuous in the extreme for this agency suddenly to bootstrap significant commercial television deregulation on the fact that its DBS and LPTV decisions prejudice conventional broadcasters.

[16] It is argued that a "straightforward cost/benefit analysis" may supply another rationale for reducing these regulations. This approach is substantially a restatement of the third justification advanced, since many recent federal initiatives against burdensome regulation are essentially based on this calculus. In any event, at the risk of stating the obvious, a regulation should not be rescinded merely because it imposes costs. Furthermore, even if a regulation's costs outweigh its public benefits, the Commission is obliged to consider less burdensome alternatives before reflexively repealing it. *See UCC* v. *FCC*, *supra* note 2, slip op. at 48–52.

The Notice also maintains that licensees will remain responsive to the public absent present requirements because: (1) most licensees exceed the programming

tion into broadcasters' daily activities may have become more intrusive than reasonably necessary to protect the public interest.[17] With the advantage of hindsight, it appears that the cost of complying with certain requirements — the ascertainment primers, for example — may indeed outweigh their public interest benefits, and that our programming guidelines, *as now structured*, may not optimally serve the public interest. Therefore, while I do not propose at this time to abandon ascertainment, non-entertainment programming, commercialization and logging requirements altogether, I am receptive to schemes that would permit television licensees to meet their public interest requirements in a less burdensome manner. In other words, my initial view is that it may be possible to achieve the public interest objectives at the heart of these procedures through more finely tuned administrative tools. All constructive ideas along these lines will receive my most careful attention.

In conclusion, I have considerable reservations about this Notice. Therefore, I hope these proposals will attract robust comment and debate by affected licensees, the general public they serve, and all other interested parties. The Commission cannot properly discharge

---

guidelines and generally air less commercial matter than specified by the commercialization guideline; and (2) if a broadcaster is unresponsive, it will invite "the ultimate sanction: viewers will stop viewing." *See* Notice at para. 43. The persuasiveness of these arguments is extremely limited. The fact that most licensees comply with FCC programming guidelines is unremarkable — after all, those guidelines were intended to reflect industry norms so the Commission's oversight resources could be reserved for exceptional license renewal applications. As for the latter claim, given that the economics of television foster mass appeal programming, the contention that dissatisfied viewers can substantially affect television choices is fundamentally flawed. It is altogether irrelevant as to demographically undesirable groups (*i.e.* those with limited purchasing power), whose "sanction" is unheard in this marketplace, and for residents of communities with limited video alternatives.

[17] I must confess some bewilderment, however, over the industry's apparent enthusiasm for this rulemaking. At least part of the scheme under review here was prompted by licensees in the interest of certainty and security. That certainty has been undermined to some extent by the FCC's failure to promulgate understandable comparative renewal standards. If the most deregulatory options proposed herein are adopted, a licensee's certainty about what service is necessary to obtain a "renewal expectancy" would be further reduced (as would the FCC's ability to fashion manageable and meaningful comparative renewal standards) because evaluation of licensee performance would inescapably require more subjective administrative judgments. *See also Deregulation of Radio*, 84 FCC 2d 968–989 (1981) (licensee not entitled to comparative renewal expectancy for "minimal service," which consists of "performance of all statutory obligations (i.e., Fairness Doctrine, access by candidates for federal elective office, etc.) and minimal although adequate, attention to the issues confronting the licensee's community primarily, and service area outside its community secondarily"). In such an environment, a substantial number of licensees would probably adhere to existing requirements in an effort to insure against a petition to deny or competing application, thereby negating the claimed benefits of reduced regulation. *See also Simon Geller*, 90 FCC 2d 250 (1982), *appeal docketed sub nom. Committee for Community Access* v. *FCC*, no. 82–2314 (D.C. Cir. Nov. 2, 1982).

its public interest mandate in an information vacuum. If our policies are misguided or unduly burdensome, it is incumbent upon the public to identify these failings, and if possible, to propose alternatives also calculated to safeguard the public interest. In the final analysis, of course, this Commission bears the responsibility for protecting the paramount interests of this nation's viewers and listeners. Absent legislative change, our statutory stewardship may not be delegated to licensees in the name of deregulation or any other popular ideology.

Application for Review
Fairness Doctrine
Fairness Doctrine, Complaint Sufficiency in Overall Programming
Fairness Doctrine, Controversial Issue of Public Importance

Application for review denied. Complainant must identify a particular well-defined controversial issue of public importance. In addressing overall programming, complainant must consider programming aired prior to a subject broadcast.
–*Conservative Caucus, Inc.*

FCC 83–314

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In re Complaint of
THE CONSERVATIVE CAUCUS, INC.
against
CBS, INC.
New York, New York

MEMORANDUM OPINION AND ORDER

(Adopted: June 29, 1983; Released: July 11, 1983)

BY THE COMMISSION:

1. The Commission has before it an Application for Review of the Broadcast Bureau's December 10, 1981 ruling, filed January 12, 1982, by The Conservative Caucus, Inc.[1]

2. The Bureau's ruling addressed the September 24, 1981 complaint, filed by The Conservative Caucus against the CBS television network, asserting that CBS had violated the Fairness

[1] On February 1, 1982, The Conservative Caucus filed a supplement to its Application for Review, composed entirely of "The Phyllis Schlafly Report," which includes her views on "national defense" and CBS' presentation of the subject programming. On May 12, 1982, The Conservative Caucus further supplemented its Application, requesting the Commission to consider that "The Defense of the United States" was shown during prime time and was broadcast on five successive days. On September 16, 1982, The Conservative Caucus requested and was granted additional time to further supplement its Application. Thereafter, on a periodic basis it submitted information purporting to demonstrate inaccuracy and unequal treatment in CBS' reporting of the subject series. On May 2, 1983, The Conservative Caucus informed the Commission it did not intend to submit further information.

Doctrine as a result of its airing of a five-part series entitled "The Defense of the United States."[2] The Conservative Caucus identified the controversial issue of public importance discussed as generally "national defense," and stated that its "monitoring" of CBS' nonentertainment programming "since" the series was presented demonstrated that CBS had failed to present contrasting views to those presented during the series. The complainant also stated that CBS refused its request that both sides of the issue be presented as required by the Fairness Doctrine. In addition, the complainant alleged that much of the information presented was "untrue and one-sided" and "misrepresented issues of great national importance."[3]

3. The Broadcast Bureau advised the complainant that its complaint was deficient in two respects: (1) it failed to identify a particular, well-defined controversial issue of public importance;[4] and it failed to address CBS' overall programming with respect to any broadcasts which aired *prior* to the subject series and which may have contained contrasting viewpoints.[5] Moreover, in the absence of a contrary *prima facie* showing, the Bureau indicated that the

---

[2] The Conservative Caucus' initial complaint and Application for Review stated that the series was broadcast August 3–7, 1981, during prime time. It is our understanding that the programs were initially broadcast June 14–18, 1981, during prime time and rebroadcast August 3–7, 1981, at 11:30 p.m., EDT, which is after prime time viewing hours.

[3] In response to this aspect of the complaint, the Bureau stated that:

> [T]he Commission is not the national arbiter of the "truth" of the news programming or the judge of the wisdom, accuracy or adequacy with which it may have been handled on the air.

The Bureau did indicate, however, that the Commission may appropriately act if it is furnished extrinsic evidence of an attempt by a broadcaster to "engage in intentional and deliberate falsification ('slanting or rigging') of the news."

[4] The Bureau stated:

> [W]ithin the issue of national defense you have brought together numerous individual issues that you have determined are relevant to the broader national defense discussion. For instance, under the umbrella of national defense you have identified a multiplicity of issues including the necessity for a United States military buildup, the relative military strengths of the United States and Russia, the nuclear strategy of Russia, Salt Treaty issues and Soviet influence in various countries throughout the world.

Furthermore, the Bureau, citing *American Security Council Educational Foundation (ASCEF) v. FCC*, 607 F.2d 438 (D.C. Cir. 1979), stated in pertinent part that:

> Consideration of the issues together, rather than individually, would not provide a basis for determining whether the broadcaster presented a reasonable balance of conflicting views because views on any one issue do not support or contradict views on the others. [Id. at 449.]

[5] In this regard, The Conservative Caucus stated that it had "consistently monitored news, public affairs and other nonentertainment programming *since* the airing of 'The Defense of the United States.'" (Emphasis added.) The complainant failed to address any programming prior to the subject series.

reasonableness or good faith of CBS' assertion to the complainant that it has "given extensive coverage to a wide array of opposing viewpoints bearing on these issues," is unrefuted.

4. In its Application for Review, The Conservative Caucus argues that the Bureau misapplied Commission precedent to its identification of "national defense" as a controversial issue of public importance. The Conservative Caucus contends that the issue of national defense, as presented by its complaint, sufficiently identified "an issue of exceptional public importance" and is clearly distinguishable from the facts in *ASCEF*, *supra*. In this regard, The Conservative Caucus argues that:

> All ASCEF requires is that when an issue, such as national defense, contains separate subissues, those subissues must be related in such a manner that "average viewers or listeners can be expected to believe that expression of a view on one supports or refutes a view on another. . . ." [*ASCEF* at 450.]

Accordingly, The Conservative Caucus contends that *ASCEF* is inapplicable because the subissues "outlined in [its] complaint are obviously well enough related that reference to the *ASCEF* case is erroneous." We disagree. The Conservative Caucus makes a bare assertion that the subissues in its complaint are "obviously well enough related" to "national defense." It provides no basis for the contention that the views on any one subissue directly support or contradict views on the others. Moreover, the claim that the subissues are "well enough related" ignores the Court's statement in *ASCEF*, cited by the Broadcast Bureau that:

> The issues that ASCEF joined together may have reference in varying degrees, to the umbrella concept of "national security." However, their relationships to one another are tangential. [Id. at 449].

The Bureau did not dispute the relevance of the subissues to "national defense." It concluded, correctly we believe, that The Conservative Caucus had not made a requisite showing demonstrating that the various subissues it identified were in effect interrelated to the extent that views on any one support or contradict views on any of the others. For example, views on Soviet influence in various countries throughout the world do not necessarily support or contradict views on Salt Treaty issues or Soviet nuclear strategy. This goes to the heart of the *ASCEF* decision. *ASCEF* stands for the proposition that a broadcaster when faced with a Fairness Doctrine complaint should be able to tell with a reasonable degree of certainty whether it has presented contrasting points of view in compliance with the Fairness Doctrine. As the Court in *ASCEF* stated:

> Unless a broadcaster can recognize the issue "with precision and accuracy" [cite omitted], proof of compliance with the Fairness Doctrine would require the production of "recordings or transcripts of all news programs, editorials, commentaries, and discussion of public issues, many of which are treated over long periods of time." [Id. at 451; cite ommitted.]

Thus, The Conservative Caucus' identification of the issue is not distinguishable from the circumstances in *ASCEF*, and clearly the rationale for the determination in that case is directly applicable to this complaint. The Court recognized the potential burden on a broadcaster when an identification of a controversial issue of public importance involves a myriad of subissues so extensive and diverse that to demonstrate compliance with the Fairness Doctrine, the broadcaster would be obligated to embark on an exhaustive, unnecessarily burdensome search of its programming. In this context, the Bureau cited the Court's statement in *ASCEF* that:

> The Commission has wisely determined that imposition of such onerous burdens on broadcasters would, in practice, defeat the policy of "encouraging robust, wide-open debate." [*Id.* at 451.][6]

It is important to note in light of the above discussion that our interpretation of *ASCEF* does not foreclose the success of every fairness complaint concerning broad, complex issues. The Court in *ASCEF* recognized that absent sufficient particularity some issues like "national defense" are inherently subject to numerous possible interpretations of what the issue means.[7] Unless the issue is adequately defined, it may, as illustrated in this case, contain subissues which, although related to the umbrella issue, do not necessarily contrast each other. Thus, in addressing an issue as broad as national defense it is incumbent upon a complainant to identify precisely what controversy concerning that issue is being focused upon, and if subissues are identified, to demonstrate how they are related to each other. If a complainant can neither define the umbrella issue with sufficient detail, nor explain how views on each subissue contrast with the others, the complainant should consider addressing individual subissues as separate controversial issues of public importance. Without such particularity, it is

---

[6] In this context, the following statement by the Court in *ASCEF* is pertinent:

> An editor preparing an evening newscast would be required to decide whether any of the day's newsworthy events is tied, even tangentially, to events covered in the past, and whether a report on today's lead story, in some remote way, balances yesterday's, last week's or last year's. Because this requirement would not promote the public interest, the limitations on the exercise of news judgment would be unjustified. [*Id.* at 455].

[7] In this connection, Chief Judge Wright's concurring opinion in *ASCEF* stated:

> That "national security" means different things to different people is incontestable and, in this fairness doctrine context, fatal to petitioner's complaint. To some, national security means devoting the bulk of our national resources to creating the ideal society. . . . To others, this is nonsense: national security translates literally into military superiority. Still others take a more discriminating view and seek to arrive at a secure compromise between domestic improvements and military might. And within each of those conceptions of National Security there is a sufficient number of allocational configurations to correspond to the multiplicity of individual visions of a "secure" nation. [Id. at 454.]

impossible from a practical standpoint for the broadcaster or the Commission to know how compliance with the Fairness Doctrine can be demonstrated.

5. Assuming the issues listed in footnote 4, *supra*, were related as advocated by complainant, it has still not shown that CBS failed to afford a reasonable opportunity for contrasting views in its overall programming. In this regard, the Bureau noted The Conservative Caucus' assertion that, in "monitoring" CBS' programming "*since* the airing of 'The Defense of the United States,'" it found a lack of contrasting views to those presented during the series. The Bureau stated:

> Clearly, the burden upon the complainant to demonstrate an imbalance in the discussion of a controversial issue of public importance in a broadcaster's *overall* programming cannot exclude consideration of programming *prior* to subject presentations.

Rather than furnishing the necessary information regarding CBS' programming "prior" to "The Defense of the United States," the complainant now merely states that "The Conservative Caucus has not, however, contended that the programming *prior* to that series or that overall programming of CBS should not be taken into consideration in deciding whether or not Fairness Doctrine violations have been established." Clearly, The Conservative Caucus has still not made any showing regarding its viewing prior to the series, nor has it indicated any effort to ascertain the extent, if any, of CBS' presentation of contrasting views during this period. Absent such information, the Commission remains without a necessary element of a *prima facie* Fairness Doctrine complaint. Furthermore, we believe that The Conservative Caucus' complaint is deficient in an additional respect. The complaint states that officers of The Conservative Caucus have "consistently monitored news, public affairs and other nonentertainment programming by CBS since the airing of 'The Defense of the United States.'" There is no description of what "monitored" means. The *Fairness Report*, 48 FCC 2d 1, 19 (1974), states that "complainants should specify the nature and extent of their viewing or listening habits." In this regard, the Commission has stated that:

> [It] did not intend that the mechanical repetition of the words "regular viewer" or the assertion that the complainant "routinely listens to [or views] the news, public affairs and other nonentertainment programs" broadcast by the station, without the additional specific information setting forth the "nature and extent" of the complainant's viewing habits [cite omitted] would be considered an adequate basis for a Fairness Doctrine complaint. [*John Howard*, 55 FCC 2d 777, 780–81 (1975).]

Clearly, this is equally applicable to the complainant's bare monitoring assertion.

6. The Conservative Caucus supplemented its Application with documents contaning the views of various military personnel and

other interested parties who question the accuracy and balance of CBS' reporting. However, although the Bureau's ruling clearly advised the complainant that the Commission will not take action in this area unless provided with extrinsic evidence of *deliberate* distortion, no such evidence was furnished. Thus, because the Commission appropriately avoids arbitrating the truth or falsity of news programming, or judging the handling of particular news events in the absence of extrinsic evidence of bad faith, this aspect of the Application also fails to warrant alteration of the Bureau's ruling.

7. We recognize the high burden placed upon Fairness Doctrine complainants. However, the public interest is best served by avoiding government involvement in programming judgments as much as possible. By placing high procedural burdens on complainants, station and network inquiries initiated by the Commission are made only when we receive thorough, well-documented complaints. As the Bureau noted, we would place a heavy burden on broadcasters if we asked them to demonstrate compliance with the Fairness Doctrine on every complaint. If this were the case, broadcasters might tend to avoid controversies and present only bland programming rather than subject themselves to that burden. Such a result would certainly be contrary to the public interest, particularly because we seek to encourage vigorous coverage of the controversial issues of public importance that face us every day.

8. Having carefully examined the pleadings before us, it appears that The Conservative Caucus has presented no new or additional information or arguments which would warrant reversal or alteration of the Broadcast Bureau's ruling in this matter. Accordingly, in view of the above considerations, the Application for Review filed by The Conservative Caucus IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Application for Review
Fairness Doctrine
Fairness Doctrine, Controversial Issue of Public Importance

Application for Review of Bureau ruling denying a complaint against the ABC television network denied. Complainant failed to establish that the treatment of allergy sufferers is a controversial issue of public importance.
*–Council of Allergy/Immunology*

FCC 83–294

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In re Complaint of

JOINT COUNCIL OF ALLERGY AND IMMUNOLOGY

against

AMERICAN BROADCASTING COMPANIES, INC.

MEMORANDUM OPINION AND ORDER

(Adopted: June 23, 1983; Released: June 28, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. The Commission has before it an Application for Review of the Broadcast (now Mass Media) Bureau's September 10, 1982 ruling[1] filed October 12, 1982, by Stephen Paul Mahinka on behalf of the Joint Council of Allergy and Immunology (JCAI).

2. The ABC television network, on its July 6, 1981 news program, "ABC World News Tonight," presented a news story that focused on a method of treatment for allergy sufferers called "clinical ecology." In response to this program, JCAI filed a complaint on June 25, 1982, requesting "that the Commission direct the American Broadcasting Companies, Inc. to provide the Joint Council of Allergy and Immunology with a 'reasonable opportunity for the presentation of conflicting views' on a controversial issue of public importance regarding safety and health, as required under the Fairness Doctrine. . . ." JCAI identified the issue as "what doctors should do for this nation's nearly 35 million allergy sufferers."

[1] A copy of the ruling is attached (Appendix).

3. On September 10, 1982, the Bureau ruled that ABC was not unreasonable in determining that the issue in question "did not involve a controversial issue of public importance subject to the Fairness Doctrine." In addition, the Bureau noted that the complainant had failed to establish "the nature and extent of the viewing habits" of its members.

4. In its Application for Review, JACI asserts that in addition to the broadcast in question, "recent attention from both the media and government officials, which the [s]taff determination failed to take into account, supports JACI's contention that the issue addressed in its complaint is both important and controversial." JCAI also reiterates its allegations that ABC's overall programming fails to present contrasting viewpoints and that the broadcast in question was a "one-sided" presentation. In addition, JCAI asserts that it adequately established the nature and extent of its members' viewing habits in accordance with the *Fairness Report*, 48 FCC 2d 1, 19 (1974).[2]

5. In support of its contention that the subject issue has received significant media attention, JCAI refers to the August 23, 1982 edition of Newsweek magazine which contained "a cover story on the subject of 'Allergies: New Discoveries, New Relief.'" JCAI states that this cover story "included a lengthy discussion of the growing controversy surrounding the methods of the 'clinical ecologist.'" In addition JCAI notes that, in August 1982, the Chicago Tribune carried a three-part series entitled "War on Allergies" which discussed methods of allergy research and treatment. Regarding its contention that this issue has received attention by government officials, JCAI explains that in June 1982 the Environmental Protection Agency circulated within the Agency a draft of a study entitled "Mini-Assessment of Selected Future Environmental Problems: Environmental Allergy." JCAI states that this "study directly addresses the growing controversy concerning alternative treatments for allergy sufferers."

6. JCAI asserts that the Bureau "failed to take into account" recent attention by the media and government officials pertaining to the subject issue. This material is brought to the Commission's attention for the first time in JCAI's Application for Review. Section 1.115(c) of the Commission's rules and regulations (47 C.F.R. § 1.115(c)) states that "No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." The complainant did not submit copies or even identify the existence of the

[2] In this regard, JCAI in its June 23, 1982 complaint stated "JCAI's member organizations have several individuals who are and have been for some time regular viewers of the network's news and public affairs programming, including Abe L. Aaronson, M.D., and Robert J. Becker, M.D."

Newsweek and Chicago Tribune articles or the EPA draft while its complaint was pending before the Bureau.[3] Therefore, under Section 1.115(c) these matters are not properly before the Commission. Under the Fairness Doctrine it is incumbent on the complainant, and not the Commission, to establish a *prima facie* case. In assessing a Fairness complaint, the Commission examines only material submitted by the complainant in accordance with our rules.

7. In any event, even if the above-mentioned writings were properly before the Bureau and contemporaneous with the broadcast, we do not believe that they show the treatment of allergy sufferers to be a "controversial issue of public importance" so as to make ABC's judgment unreasonable. As the Bureau previously quoted in its ruling, to establish the controversiality of an issue, a complainant must show that an issue "is the subject of vigorous debate with substantial elements of the community in opposition to one another." *Fairness Report*, 48 FCC 2d at 12. The existence of two articles in the media, an unpublished report by a government agency, and the July 6, 1981 program in question, do not, in themselves, demonstrate that the treatment of allergy sufferers is controversial. The Bureau correctly concluded that media attention does not necessarily make an issue controversial. *See Healey v. FCC*, 460 F.2d 917, 922 (D.C. Cir. 1972).

8. Having carefully examined the pleadings before us, it appears that JCAI has presented no new or additional information or arguments which would warrant reversal of the Bureau's ruling on this matter. Therefore, we agree with the Bureau's finding that ABC was not unreasonable in its determination that the treatment of allergies, although newsworthy, is not an issue which should be subject to the Fairness Doctrine.

9. In regard to establishing the nature and extent of the viewing habits of the JCAI members, the JCAI complaint presents nothing more than a "mechanical assertion" of viewing habits (see Appendix), which we have found to be an insufficient showing for establishing a *prima facie* fairness complaint. Therefore, the Bureau was correct in finding that "[a] mechanical assertion that one is a 'regular viewer' will not serve to establish that the licensee, in its overall programming, has failed to present contrasting points of view." *John Howard*, 55 FCC 2d 777, 780–81 (1975); *Environmental Defense Fund*, 90 FCC 2d 658 (1982).

10. In view of the foregoing, it is unnecessary for us to address whether ABC's overall programming, or the program in question, presented contrasting viewpoints on the issue in question.

[3] The Newsweek and Chicago Tribune articles were published after the complaint was filed, but before the Bureau's ruling, and more than one year after the broadcast in question.

11. Accordingly, in view of the above considerations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

September 10, 1982

IN REPLY REFER TO:

8330-D
C6-677

Joint Council of Allergy and Immunology
c/o Stephen Paul Mahinka, Esq.
1800 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Mahinka:

This is in response to your Fairness Doctrine complaint, filed June 25, 1982, on behalf of The Joint Council of Allergy and Immunology (JCAI) which alleges that the ABC television network, on its July 6, 1981 news program, "ABC World News Tonight," violated the Fairness Doctrine.

You assert that ABC only presented one side of the issue you identify as, "what doctors should do for this nation's nearly 35 million allergy sufferers." You allege that "the broadcast appeared to endorse . . . 'clinical ecology'" as a treatment for allergy sufferers, but failed to indicate that "traditional methods of medical treatment [for allergies] . . . have been shown to be safe and effective. . . ." You further assert that several members of JCAI, including Drs. Abe L. Aaronson and Robert J. Becker, are "regular viewers of the network's news and public affairs programming" and "have never encountered" programming on the traditional treatment of allergies. You assert the above stated issue is controversial and its controversiality was recognized by the "ABC World News Tonight" commentator when he stated there is "a growing controversy over what doctors should do for this nation's . . . allergy sufferers." Furthermore, you assert this issue is of public importance because a major portion of the United States' population, at least 35 million people, suffer from allergies, and that Fairness Doctrine obligations require "considered attention" to issues directly "affecting public safety and health." In addition, you allege that ABC's response to your Fairness Doctrine complaint was "incorrect and misleading" because, contrary to ABC's contention, the program "clearly appeared to advocate the methods of clinical ecologists." Finally, you assert that ABC did not clearly specify the subject of discussion in those programs it identified as representing contrasting viewpoints on the issue. As a result, you request that the Commission investigate ABC's response to your complaint and order ABC to provide you with a reasonable amount of time to present a contrasting viewpoint.

In reviewing complaints under the Fairness Doctrine, the Commission does not substitute its judgment for that of the broadcaster. Rather, the Commission considers whether the station or network has acted reasonably and in good faith. As the Commission stated in the *Fairness Report*, 48 FCC 2d 1, 9 (1974):

> We firmly believe that the public's need to be informed can best be served through a system in which the individual broadcasters exercise wide journalistic discretion, and in which government's role is limited to a determination of whether the licensee has acted reasonably and in good faith. [Citation omitted.]

In its December 9, 1981 response to your letter of November 3, 1981, ABC indicated that its program was newsworthy, but it did not involve a controversial issue of public importance under the Fairness Doctrine. Furthermore, ABC did not feel that its broadcast could be characterized as "an endorsement of clinical ecology" since it had presented criticisms of clinical ecologists within the same program.[1] Finally, ABC indicated that on four different occasions allergists have appeared on the "Good Morning America" program and, as a result, it was of the opinion that it had presented a representative sampling of allergy treatments in its programming.

To establish a *prima facie* case under the Fairness Doctrine, a complainant should demonstrate that an issue is *both* controversial and of public importance.[2] In determining the "controversiality" of an issue, a licensee should consider "the degree of attention paid to an issue by government officials, community leaders, and the media . . . and whether an issue is the subject of vigorous debate with substantial elements of the community in opposition to one another." *Fairness Report, supra,* at 12. You have not made any showing that this issue, the appropriate treatment of allergy sufferers, has received attention from government officials, community leaders or the media (except for the broadcast in question). Moreover, you have not established that this issue has been subject to vigorous debate with substantial elements of the community in opposition to one another. An issue which may be debated within the medical field will not, by itself, be considered controversial. *See Thomas W. Lippitt,* 53 FCC 2d 1195 (B/c Bur. 1975). There must be a cognizable public controversy for the Fairness Doctrine to apply. *See American Vegetarian Union,* 38 FCC 2d 1024, 1026 (B/c Bur. 1972), *review denied,* 45 FCC 2d 1038 (1973); *Nellie Shriver,* 46 FCC 2d 1121 (B/c Bur. 1974). Furthermore, an issue is not necessarily controversial or of public importance because it has received media attention. In this regard, the Court of Appeals in *Healey v. FCC,* 460 F.2d 917, 922 (D.C. Cir. 1972) stated:

> Merely because a story is newsworthy does not mean that it contains a

---

[1] ABC indicated in its letter of December 9, 1981, that "[i]n addition to the critical comments of Dr. Garry Ross," its correspondent, James Walker, "pointed out that the views of clinical ecologists were 'controversial' and that they 'have drawn sharp criticism from the medical establishment.'"

[2] In addition to the foregoing, the *Fairness Report, supra,* states that the complainant should include the following information to establish a *prima facie* complaint:

(1) the broadcaster (station or network) involved;

(2) the specific issue of a controversial nature broadcast (complainant should include an accurate summary of the views broadcast);

(3) the date and time when the issue was broadcast;

(4) reasonable grounds for the claim that the station or network broadcast only one side of the issue in its overall programming;

(5) copies of correspondence between the complainant and the broadcaster; and

(6) whether the broadcaster has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue.

> controversial issue of public importance. Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues.

Thus, the existence of media coverage, by itself, is insufficient to demonstrate an issue is subject to the Fairness Doctrine.

In view of the foregoing, we cannot find that ABC was unreasonable in determining that its July 6, 1981 program, "ABC World News Tonight," did not involve a controversial issue of public importance subject to the Fairness Doctrine.[3]

Moreover, you have asserted that several members of JCAI, including Drs. Aaronson and Becker, are "regular viewers of the network's news and public affairs programming." Although the Commission does not require complainants to be "around the clock" viewers of a station or network in order to establish unbalanced programming, they are, however, required to "specify the nature and extent of their viewing or listening habits, and should indicate the period of time during which they have been regular members of the station's audience." *Fairness Report, supra,* at 19. A mechanical assertion that one is a "regular viewer" will not serve to establish that the licensee, in its overall programming, has failed to present contrasting points of view. *John Howard,* 55 FCC 2d 777, 780–81 (1975); *Environmental Defense Fund,* 90 FCC 2d 648 (FCC 82–268, July 9, 1982). You have made no showing as to the nature and extent of the viewing habits of Dr. Aaronson, Dr. Becker or any other members of JCAI.

Accordingly, no further action is warranted on your complaint. We recognize the high burden placed upon Fairness Doctrine complainants. However, the public interest is best served by avoiding government involvement in programming judgments as much as possible. By placing high procedural burdens on complainants, station and network inquiries initiated by the Commission are made only when we receive thorough, well-documented complaints. We would place a heavy burden on broadcasters if we asked them to demonstrate compliance with the Fairness Doctrine on every complaint. If this were the case, broadcasters might tend to avoid controversies and present only bland programming rather than subject themselves to that burden. Such a result would certainly be contrary to the public interest, particularly because we seek to encourage vigorous coverage of the controversial issues of public importance that face us every day.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the date of public notice of this letter (see Commission Rule 1.4(b) [47 C.F.R. §1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to

---

[3] In your complaint you have requested that the Commission order ABC to provide JCAI with a reasonable amount of time to present a contrasting point of view. Under the Fairness Doctrine no individual or group has the right to respond to a controversial issue of public importance. Instead, the licensee exercises wide journalistic discretion in determining who may present contrasting viewpoints. Therefore, even if the Fairness Doctrine were applicable in this case, JCAI would not necessarily be afforded any broadcast time to present its viewpoint.

the parties to the complaint. See Commission Rule 1.115 (47 C.F.R. §1.115).

Sincerely,

Jeffrey W. Malickson
Assistant Chief
Complaints and Compliance Division
Broadcast Bureau

Frequency Allocation
Satellite Direct Broadcast

Reallocation of spectrum to enable establishment of new Direct Broadcast Satellite service affirmed on reconsideration, given policies and procedures adopted to protect legitimate interests of existing users of the frequency band.
*–Direct B/c Satellite Service*
*GEN. Docket No. 80–603*

FCC 83–241

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In the Matter of | |
| Regulatory Policy Regarding the Direct Broadcast Satellite Service | General Docket No. 80–603 |

MEMORANDUM OPINION ORDER

(Adopted: May 17, 1983; Released: May 19, 1983)

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN THE RESULT.

## *I. Introduction*

1. This *Order* considers and denies a petition for reconsideration of the Commission's June 23, 1982, *Report and Order* in General Docket 80–603 ("*DBS Report and Order* "), 90 F.C.C. 2d 676 (1982), that established initial rules and policies for the direct broadcast satellite ("DBS") service. The petition, filed on August 3, 1982, for the County of Los Angeles ("LA County") by George Y. Tice, Director of Communications, is limited to issues raised by the Commission's action confirming the allocation of the 12.2-12.7 GHz (12 GHz) band for satellite to earth transmissions in the DBS service, and outlining plans for accomodation of terrestrial microwave fixed service (fixed service) licensees currently using that spectrum. Oppositions were timely filed by Direct Broadcast Satellite Corporation ("DBSC"), Satellite Television Corporation ("STC"), Western Union Telegraph Company ("WU"), and United States Satellite Broadcasting Company ("USSB"). LA County is a licensee in the fixed service in the 12 GHz band. All parties participated in earlier stages of this proceeding.

2. The petition for reconsideration makes three substantive allegations:

(1) The Commission allocated the 12.2-12.7 GHz band for DBS use without giving adequate consideration to the needs of fixed service users of the band.

(2) The proceeding to accommodate the needs of existing 12 GHz fixed service licensees,[1] first announced and outlined by the Commission in the *DBS Report and Order*, will not protect adequately the needs of these licensees.

(3) The Commission did not establish a procedure in the *DBS Report and Order* to compensate adequately fixed service licensees that must move from the 12.2-12.7 GHz band.

LA County implicitly requests that the 12 GHz spectrum allocation be suspended pending full Commission consideration of the needs of fixed service users, and explicitly requests that it be suspended pending the conclusion of the 1983 Region 2 Administrative Radio Conference ("RARC-83"). At that conference, the United States and other regional administrations will adopt procedures for the sharing of the 12 GHz spectrum for direct satellite broadcasting services within Region 2. LA County also requests that the terrestrial proceeding be structured to allow public comment on the spectrum allocation issue after RARC-83. Opposition comments generally assert that the petition is technically flawed, that the allocation of the 12.2-12.7 GHz band to DBS was proper, that the needs of present and future fixed service users are protected adequately under the present procedures and plans, and that granting the petition would unnecessarily delay the introduction of DBS service to the detriment of the public interest. Consideration of these issues requires a somewhat detailed exposition of the relevant details of the DBS rule making and associated proceedings.

## *II. Background*

3. The potential conflict of fixed service and DBS use of the 12.2-12.7 GHz band was considered by this Commission upon initiating this proceeding in 1980 with the *Notice of Inquiry*, 45 Fed. Reg. 72719 (published November 3, 1980). Therein the Commission noted that shared use of the band by fixed and DBS services might be impossible and thus requested comment on how to accommodate existing 12 GHz users, if required. Subsequently, after extensive comment and full consideration of these difficult issues, the Commission adopted the *Notice of Proposed Policy Statement and Rulemaking*("*Notice* ") in this proceeding, 86 F.C.C. 2d 719 (1981), designating the 12.2-12.7 GHz spectrum for DBS use. The *Notice* proposed that when DBS satellites began operating, "terrestrial licensees in the 12 GHz band will be required to make whatever adjustments in technical parameters or assigned frequencies necessary to prevent harmful interference to operating DBS systems." *Id.* at para. 36. To facilitate the needed adjustments, the *Notice* indicated that existing fixed service

[1] This proceeding, General Docket 82–334 (see paragraph 9, *infra* ), is referred to herein as the "terrestrial rule making" or "terrestrial proceeding."

users would be subject to reassignment within or outside the 12 GHz band. The Commission announced these intentions at that time to give existing fixed service licensees enough time to prepare for a possible transition to other bands. *Id.* at para. 37. In addition, the *Notice* established a procedure to give specific notice to all new fixed service licensees of the probable need to alter frequencies at some future date to prevent harmful interference to operating DBS systems.[2]

4. The *Notice* reflected extensive study of the issues posed by the fact that the 12 GHz band was then being used by fixed service licensees. Recognizing the costs associated with a move to other bands by fixed service licensees, it invited comment on the best way to allocate these costs. The Commission proposed that existing fixed service licensees bear all costs of relocation, but the accompanying discussion considered the option of establishing a transition period when DBS and fixed services would share the band. The transition period was suggested to give fixed service users time to move to other bands as equipment reached the end of its useful life. In discussing this option, the *Notice* stated that reception of DBS signals during this period would be impossible and that the financial impact on the DBS systems might be severe. In contrast, spectrum sharing during this period was expected to have no negative impact on fixed service systems. Given the comparative disadvantage of such sharing to DBS operators, the Commission suggested that arrangements might be sanctioned wherein DBS operators could pay some costs of relocation by fixed service operators in return for earlier non-restricted use of the band. Additionally, the *Notice* announced the Commission's intention to initiate a proceeding looking to expansion of the alternative bands available for fixed services. Specifically, this new proceeding was to consider rules to initiate use of higher, undeveloped fixed service bands and to re-examine the rules governing the use of the fixed service at the lower bands.

5. Six months after publication of the *Notice*, the Aerospace and Flight Test Radio Coordinating Council ("AFTRCC") submitted a "Petition for Expedited Relief" seeking substantially the same relief as requested here by LA County. More specifically, the AFTRCC petition requested that the Commission (1) initiate a study of the 12 GHz and other bands for fixed service use, and (2) defer authorizing DBS in the 12 GHz band until the study was complete. The

[2] *Id.* at para. 36. Between the date of issuance of the *Notice* and the *DBS Report and Order*, the Private Radio Bureau specifically advised all new applicants for fixed service licenses in the 12 GHz band of the proposed DBS allocation decision, and of the probable need to change frequencies in the future. Similarly, all such licenses issued during this period were expressly conditioned on the outcome of the DBS proceeding. Since adoption of the *DBS Report and Order*, all fixed service license authorizations have been accompanied by a copy of the June 1982 News Release announcing Commission adoption of the *DBS Report and Order*.

Commission incorporated that pleading and the accompanying record into the DBS rule making.

6. The *DBS Report and Order* gave extensive treatment to the spectrum allocation and sharing issues raised in the *Notice*, in the AFTRCC petition, and in the combined record. In considering these issues in the *DBS Report and Order*, the Commission proceeded from two policy premises: first, the concerns of the fixed service users deserved serious attention; second, the potential public interest benefits of DBS justified both expedited action by the Commission and some adjustments by other services. Concluding that these premises posed difficult but not incompatible policy choices, the Commission chose a course of action designed both to avoid unnecessary delays in the DBS proceedings and to minimize the impact of its DBS allocation decision on existing 12 GHz fixed service licensees. The threshold question was whether to confirm the action of the *Notice* allocating the 12 GHz spectrum to DBS. In confirming the allocation, the Commission reviewed the spectrum needs for DBS and determined that no viable alternative to the 12 GHz spectrum existed.[3] This finding was based, in large part, on two interrelated considerations. First, the Commission concluded that sufficient spectrum for initial DBS service and its expected growth through the year 2000 must be made available quickly if its public interest goals in authorizing broadcast satellite services were to be realized fully. Second, the 12 GHz band offered the only means of accomplishing this end since it is the only spectrum suitable for satellite communications for which the necessary equipment would be readily available and in which DBS service was already authorized in the International Table of Allocations. The Commission's decision to utilize the 12 GHz spectrum for DBS was also based on various technical, legal and economic factors. One of the most important policy considerations was the need to provide sufficient spectrum to allow an "open skies" policy for DBS service that would afford the greatest possible flexibility and adaptability to those that would provide the service. The Commission noted that this policy was extremely successful in the domestic satellite area, and that it had facilitated the early implementation of many new satellite services.

7. At this point, the Commission considered extensively the issues raised by its DBS allocation action with respect to current

[3] It should be noted that the Commission decision to allocate the 12 GHz spectrum for DBS is not mandated by international agreement, but was made to further the domestic policy interest in providing for DBS service. The International Table of Allocations adopted at the 1979 World Administrative Radio Conference allows Region 2 administrations to implement several services in this band, including the Fixed, Fixed-Satellite, Mobile, Broadcasting, and Broadcasting Satellite services. The details of this sharing will be formulated at RARC-83, and have been the subject of General Docket 80–739. *See Report and Order Concerning Commission Proposals for RARC-83*, (adopted March 9, 1983), FCC 83–102, 4-28-83, 48 FR 19212.

users of the 12 GHz band. Although it continued to recognize the significance of these issues, it was then satisfied that the record contained sufficient evidence to assume that these issues could be reasonably resolved without further delay of the DBS rule making. The Commission recognized that rule makings were already in progress to establish rules and procedures governing the use of two higher bands and that these bands would be available for use by existing 12 GHz fixed service users.[4] It recognized also that these higher bands would not be entirely satisfactory to fixed service users and thus conducted an extensive review of the record and other available data to determine if more suitable spectrum could be found for many of the fixed service users. This review included a thorough exposition of the number of these licensees, the type of service they provide, the equipment and relay system arrangements employed, and the most important reasons why these users chose 12 GHz over alternative bands. On this latter point the record revealed that many fixed service users apparently chose the 12 GHz band for reasons not related to the technical characteristics of the band, including their being precluded because of status limitations on some bands and because of heavy use of some bands in specific geographical areas. The cost of equipment was also noted as a reason for selecting some bands over others. In this situation, the Commission determined that if it were to adopt changes in certain Commission procedures and policies, significant substitute spectrum might well be available in existing bands for these licensees. The Commission then tentatively identified other bands that might support existing 12 GHz users, and various means for accommodating these users through the development of rules and policies to encourage spectrum sharing and other spectrum use efficiencies. The Commission instructed the staff of the Office of Science and Technology to prepare a *Notice of Proposed Rule Making* that would look toward the adoption of these measures. The Commission stated its firm intention to take final action to accommodate these users no later than September 4, 1983. This date was chosen because of its proximity to the completion of the RARC-83 conference that will adopt final international rules for the use of the 12 GHz band by DBS in Region 2, and because it will precede post-RARC-83 authorizations of DBS systems.

8. The most important remaining matter involved the cost and timing of relocation. Given the alternatives proposed and considered in the record, the Commission adhered to its proposal in the *Notice* to require the fixed service users to bear the cost of their relocation, but included several very important provisions to mitigate these costs. First, those fixed service users that cause no interference to DBS

[4] The Commission noted two specific proceedings, Dockets 79–188 and 79–337, in which it had already identified frequencies that might be suitable for some existing 12 GHz users. *See DBS Report and Order*, n. 57.

users would be allowed to remain on the 12 GHz band indefinitely, although on a strict secondary basis. Second, all fixed service users licensed before the conclusion of the above mentioned terrestrial rule making would be allowed to remain on the band for a period of five years from the date of the conclusion of that rule making. Thus, existing fixed service licensees would be allowed to operate unimpeded until as late as September 4, 1988. This provision gave considerable notice to the affected fixed service users. Although the deadline will not be known precisely until the conclusion of the terrestrial rule making, it is apparent that current fixed service users will have about seven years to make the appropriate frequency adjustments from the time the Commission gave official notice of that probability when adopting the *Notice*, and six years from the time of the adoption of the *DBS Report and Order*. Third, the Commission sanctioned agreements by DBS and fixed service operators wherein DBS operators could agree to bear some of the relocation costs of an interfering fixed service operator in return for evacuation of the 12 GHz band before the deadline. These provisions, together with the expectation that certain fixed service operators would be able to relocate to adjacent or lower bands requiring relatively inexpensive modifications, appeared to forge the best possible compromise between the private interest of both DBS and fixed service operators, and the public interest in promoting the widest practicable availability of both services. In addition, the Commission noted that the higher frequencies appeared to offer sufficient capacity to meet the short distance radio link needs of these services in the future.

9. On January 13, 1983, the Commission adopted and released the *Notice of Proposed Rulemaking* in General Docket 82–334, FCC 83–2 ("Terrestrial Notice "), that, *inter alia*, was designed to make additional spectrum available for fixed service users displaced from the 12 GHz band. Following instructions in the *DBS Report and Order*, the *Terrestrial Notice* proposed changes and solicited comment from all interested parties on the following issues: (1) the feasibility of pooling or sharing microwave spectrum among the broadcast auxiliary, cable television relay (CARS) and private operational fixed services, (2) the need for minimum path link criteria in each of the available bands, (3) bandwidth and channeling requirements for each of the bands, (4) the feasibility of continued fixed service use of the 12 GHz band on a secondary basis, and (5) coordination and loading practices to ensure efficient use of the bands. In particular, the notice addressed the use of the frequency bands at 6 GHz, 13 GHz and 18 GHz that are expected to be most appropriate for existing 12 GHz users. The 6 GHz and 13 GHz bands were considered the most desirable because of the low cost of conversion to those bands. Although the Commission noted that some additional issues raised in the *Terrestrial Notice* might require more protracted deliberation, it declared its continued intention to

resolve those issues relating to 12 GHz conversion by the scheduled September 1983 deadline.

### *III. Discussion*

10. Given the foregoing background, the Commission now considers the procedural and substantive issues raised and the relief requested in the petition for reconsideration. The threshold consideration for any petition concerns whether it is properly before the Commission. If it fails in this regard, the Commission must reject it, unless in its independent judgment the substance of the matter is sufficiently compelling to warrant prompt action to protect the public interest. In this regard, we find that the petition fails to meet the basic requirements of a petition for reconsideration, and on this ground alone should be rejected. The failure is two fold: (1) the substantive allegations of error on the part of the Commission in adopting the *DBS Report and Order* are not supported by facts meeting the basic pleading and procedural standards for a petition for reconsideration, and (2) the petition includes a request for relief not properly filed in a petition for reconsideration.

11. The Commission's standards and requirements for petitions for reconsideration are well established by rule and case law. Most relevant here, petitions for reconsideration are not granted for the purpose of debating matters which have already been fully considered and substantively settled.[5] Similarly, parties that wish to reopen debate based on new facts can do so only under limited circumstances. Reconsideration based on new facts is appropriate only when these facts relate to events subsequent to the last opportunity for submission, were unknown and could not have been known by the petitioner at the time of the last opportunity, or the Commission determines that subsequent consideration is required to protect the public interest.[6] The subject petition does not meet these criteria.

12. In essence, the petition for reconsideration simply restates the objections to the DBS rule making that have been stated previously by this petitioner and others representing the interests of fixed service users in this proceeding.[7] Section II of this *Order* clearly

---

[5] *See, e.g., WWIZ, Inc.*, 37 F.C.C. 685, 686 (1964), *aff'd sub nom., Lorain Journal Co.* v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert.* denied, 383 U.S. 967 (1966); *Florida Gulfcoast Broadcasters, Inc.*, 37 F.C.C. 833 (1964); *Employment Practices of Stations - Charlotte, N.C. Market*, 77 F.C.C. 2d 1 (1980); *WEOK Broadcasting*, 4 Rad. Reg. 2d 503 (1965).

[6] *See Southeast Arkansas Radio, Inc.*, 61 F.C.C. 2d 72, 73 (1976).

[7] *See, e.g.*, Aerospace and Flight Test Radio Coordinating Council, Petition for Expedited Relief, General Docket No. 80-603 (Aug. 12, 1981); Comments of the Association of Maximum Service Telecasters (July 2, 1981), Harris Corporation [Farinon Electric Operations] (July 1, 1981), Manufacturers Radio Frequency Advisory Committee (July 1, 1981), and Utilities Telecommunications Council (July 1, 1981), all filed in General Docket 80-603. Indeed, LA County has been an

demonstrates that the resolution of these issues has been a central feature of this rule making from the outset, that full opportunity for all affected parties to comment has been amply afforded, that all relevant matters have been fully considered, and that the Commission made its policy choices and fashioned its procedural rule making processes to assure that the needs of the public and all interested parties were taken into account fully. That petitioner disagrees with some of these policy choices and various other procedural devices chosen by the Commission to pursue them is quite clear. However, bare disagreement, absent new facts and argument properly placed before the Commission, is insufficient grounds for reconsideration.

13. The petition suffers from one additional flaw. The primary specific relief requested is to defer the effective date of the *DBS Report and Order*, a form of relief only properly before the Commission in a separate motion for stay. Section 1.44(e) of the Commission's rules clearly sets out this requirement:

> Any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading. Any such request which is not filed as a separate pleading will not be considered by the Commission.

Moreover, even if the Commission were to put aside this rule and construe this petition as a properly filed motion for stay, the motion would fail on its merits. This is because the petitioner fails to even plead, much less demonstrate, that the basic criteria for granting such a stay are met.[8] For all of the foregoing reasons, we conclude that the subject petition for reconsideration must be denied.

14. On April 27, 1983, the Commission received from the

---

active participant in this rule making and has previously requested similar relief. *See* Comments of the County of Los Angeles (July 1, 1981), and Reply Comments of the County of Los Angeles (July 28, 1981) in General Docket 80-603. *See also* County of Los Angeles, Statement in Support of National Association of Broadcasters' Motion to Establish Reasonable and Fair Procedural Dates (July 17, 1981); County of Los Angeles, Petition to Deny (December 11, 1981); and, County of Los Angeles, Comments (Feb. 6, 1981), all filed in General Docket 80-603.

[8] The accepted criteria for granting a stay require petitioner to demonstrate the following:

(1) a strong likelihood that it will prevail on the merits of its appeal;

(2) without such relief, it will suffer irreparable injury;

(3) the issuance of the stay will not substantially harm other parties interested in this proceeding; and

(4) it is in the public interest to grant the stay.

These standards are set forth in *Virginia Petroleum Jobbers Ass'n* v. *EPC*, 259 F.2d 921 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). For a discussion of these standards in the context of the instant proceeding, *see Stay Request re: STC Interim Grant*, FCC 82–572, released December 22, 1982. *See also National Association of Broadcasters* v. *Federal*

petitioner an extensive filing entitled "Supplemental Pleading and Exhibits in Support of Petition for Reconsideration." Section 1.429 of the Commission's Rules and Regulations which details the filing requirements for petitions for reconsideration in notice and comment rule makings states in relevant part:

> (d) The petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of such action. . . . No supplement to a petition for reconsideration filed after the expiration of the 30 day period will be considered, except on leave granted pursuant to a separate pleading stating the grounds for acceptance of the supplement.

The *DBS Report and Order* was published in the Federal Register on July 21, 1982, making the filing deadline for petitions and supplements August 22, 1982. *See also* Section 1.4(b) of the Commission's Rules and Regulations. Petitioner's supplemental filing is not accompanied by a separate pleading stating specific grounds for acceptance of the supplement after expiration of the filing deadlines. Further, we note that petitioner's submission cannot be deemed a timely reply to the oppositions filed in this proceeding since the filing period for any such reply expired on September 30, 1982. Accordingly, we find that petitioner's proposed supplemental filing is not timely filed and need not be considered.

15. However, because of the gravity of the issues presented herein, we have asked the staff to conduct a preliminary review of the scope and content of the supplemental filing. Pursuant to this review, we find that petitioner's supplemental filing raises no substantive questions related to generic rule making issues which have not been addressed and resolved generally in this docket. Instead, this supplemental filing is devoted largely to submission of detailed information on how the 12 GHz allocation decision is expected to impact Los Angeles County as a multiple licensee in the fixed service. The proposed supplemental filing does not allege or suggest that the situation in Los Angeles County is representative of the situation faced by other 12 GHz licensees in the fixed service, and therefore should be a basis for general reconsideration of the 12 GHz allocation decision. The allocation issue here is of national dimensions, involving public interest questions related to DBS as well as to the fixed service, and therefore is not wholly dependent upon the situation faced by any one licensee. Thus, we find that it would be inappropriate to re-open this docket at this time to accept this supplemental filing.

16. This does not mean, of course, that we are insensitive to particularized consequences of our actions, nor that we are unwilling to consider requests for special relief where appropriate. *See* paragraph 19, *infra*. Assuming for present purposes that Los Angeles

---

*Communications Commission*, Number 82–1926 (D.C. Cir. February 10, 1983) (order denying stay).

County can successfully demonstrate its contention in the proposed supplement that the integrity of its safety and emergency services is wholly dependent on its continued use of the 12 GHz band, then the Commission would certainly fashion appropriate relief to ensure the continuation of those services. In that regard, we suggest that the substance of this proposed supplement be revised and resubmitted to not only detail the situation and the alternatives, but also to specify the types of particularized relief that would most appropriately address the situation with the minimum impact on other interested parties. Upon receipt of such request, the Commission would give it all due consideration, taking into account the full impact of the situation as demonstrated, the effect on other parties of all forms of relief suggested, and the need for timely action on the petition.

## *IV. Restatement*

17. Although we are persuaded that the inadequacies of form and substance of this petition dictate its denial here, we nonetheless believe that the petition provides a useful opportunity for the Commission to restate the relevant facts and policy considerations relied upon in our DBS decisions. This restatement should ensure that no interested party misperceives these facts nor misunderstands the procedural avenues by which the Commission seeks to resolve the related policy questions. The substantive objections raised in the petition for reconsideration provide the framework for this discussion.

18. *Allocation of the 12 GHz Band to DBS.* The Commission's allocation of the 12 GHz band for DBS use was made against the background of international and domestic spectrum allocation and planning, and reflects not only careful consideration of all the facts and arguments put before it, but also a commitment to mitigate as much as possible any dislocation the decision might engender. In the *DBS Report and Order* the Commission concluded that the allocation of 12 GHz to DBS would further fundamental communications policies, and determined that expedited action was necessary to facilitate introduction of the service to the public. It concluded that DBS offered substantial potential benefits to the American public. *See DBS Report and Order* at paragraphs 12–20.

19. Further, the Commission found that the 12 GHz band was the only frequency band available both internationally and domestically that would allow initiation of the service in the foreseeable future, and, unfortunately, that DBS and most existing terrestrial uses of the band were incompatible. After serious and searching investigation of the status, number and needs of the 12 GHz users that potentially would be displaced, the Commission announced its intention to protect those users in several ways. The first of these was to create a transition period that delayed for more than five years the need for fixed service users to change frequencies, and to

"grandfather" indefinitely those fixed service users that cause no interference to operating DBS systems. Knowing that adequate alternative spectrum was available for fixed service users at the higher frequency bands, including 18 GHz, the Commission also resolved to find as much additional frequency space as possible in the more desirable bands adjacent to or lower than 12 GHz. Thus, it announced its intention to minimize any dislocation and expense by directing the staff of the Commission to facilitate the use of these more desirable bands through the development of an associated rule making. The Commission also understood that if it is faced with specific cases involving severe hardship or potential risk to the public safety, it has both the duty and the means to address and rectify them as they arise. For example, the Commission could, upon receiving a properly supported request, extend the transition date for a limited period for fixed service licensees in a given area if loss of vital emergency or safety services was unavoidably threatened by compliance with the existing spectrum relocation requirements.[9] It is particularly important to note in this regard that even if DBS service is actually implemented, it poses no danger to fixed services since any interference resulting from simultaneous use of the same frequencies by these two services is singularly detrimental to the DBS service. This fact is especially relevant to our conclusion that delay of the DBS proceeding in order to protect critical fixed service uses of 12 GHz is neither necessary nor advisable.

20. It should also be noted, however, that our duty to ensure that safety or emergency services are not impaired runs to the benefit of the public and not a particular licensee. Thus, while we might be persuaded to extend the transition period or to provide some alternative relief in order to preserve such services, assuming a clear and well documented showing of need, we must emphasize that all licensees are expected to exert diligent and good faith efforts to prepare for and comply with our DBS allocation decision in a timely manner.

21. *Delay of the DBS and Terrestrial Proceedings.* Petitioner has requested that the DBS proceeding be held in abeyance pending Commission action subsequent to RARC-83 and completion of the terrestrial rule making. The persuasive force of this request depends upon a showing that our established approach of proceeding concurrently to implement our DBS policies and to resolve the problems of displaced fixed service users disserves the public interest. This, in turn, would require petitioner to demonstrate that this approach

[9] We do not imply, of course, that simple extension of the transition period is the only relief we might fashion. Various alternatives exist, including acceptance of interference to DBS services in specified locations or forced relocation of fixed services upon appropriate compensation by DBS operators. The nature of the remedy chosen in any given situation would depend upon the particular facts of the case and the showings made by the interested parties.

results in some specific harm that outweighs the public interest in the timely initiation of DBS service. Yet, petitioner has offered no showing of harm, either to itself or to the public interest. Indeed, our decision to proceed concurrently is reinforced by our study of these matters here.

22. The Commission has proceeded from the outset of the DBS rule making on the assumption that it should act as rapidly as possible in order to expedite the offering of DBS to the public.[10] Consistent with this assumption, the Commission reviewed the spectrum requirements of the DBS service, and determined to reallocate the 12 GHz band to broadcast satellite services. Petitioner's objections to that decision have been reviewed both here and in earlier Commission documents and need not be repeated. Petitioner now suggests that our allocation decision should be suspended until the results of RARC-83 are known. The basis for this suggestion, however, is unclear since our allocation of 12 GHz to DBS is a domestic policy matter largely unrelated to any expected outcome of RARC-83. While some details of the international allocation of 12 GHz to DBS will be worked out at the conference, the underlying international allocation decision was made at the 1979 World Administrative Radio Conference (WARC-79) and cannot be altered at RARC-83. As a result, the only possible outcome of RARC-83 relevant to the domestic allocation decision is that the full 500 MHz of spectrum would not be made available for DBS in Region 2. The only pertinent domestic consequence of this would be to *decrease* the number of existing fixed service users that would have to move from the 12 GHz band. Clearly, this result cannot be deemed detrimental to petitioner's interests. Similarly, we think it unnecessary to delay the allocation of the 12 GHz band to DBS pending the outcome of the terrestrial rule making. As previously noted, the Commission was fully satisfied that adequate spectrum existed at the higher bands to accommodate existing fixed service licensees before proceeding on the 12 GHz allocation matter. The relevant purpose of the terrestrial rule making is to find additional space at the most desirable frequencies for fixed service licensees.[11] Thus, although the addition-

[10] *See, e.g., Notice* at paras. 25–27; *DBS Report and Order* at paras. 7–27.

[11] Although sufficient frequency space exists at the higher bands for existing 12 GHz users, many licensees may be required to relocate or add transmitter/relay stations (links) to utilize these bands. Thus, a frequency shift to the adjacent or lower bands as contemplated in the terrestrial rule making would be more desirable because these bands require no additional links. When adopting the *DBS Report and Order*, the Commission estimated that under the worst possible circumstance, *i.e.*, all existing 12 GHz users moving to 18 GHz or higher, 50 to 85 percent of the links then in use would be sufficient for use at the higher bands. Assuming the use of one intermediate relay station, the Commission estimated that 75 to 90 percent of these links would be usable. *See DBS Report and Order* at para. 63.

al frequency space at these frequencies would facilitate the transition process, it is not a prerequisite. This is especially true considering the provisions adopted in the DBS docket to ensure that the services fixed services licensees provide to the public will not be interrupted. Accordingly, we believe petitioner's request that we delay the DBS proceeding is not adequately supported, particularly since granting such a request could substantially frustrate our public interest objective of implementing DBS service at the earliest practicable date.

23. The basis for petitioner's associated request that the Commission delay the terrestrial proceeding until after RARC-83 is similarly unclear. The primary purposes of the terrestrial rule making are to find additional spectrum for fixed service users, and to create rules and procedures that will facilitate more efficient spectrum use. Although related to the need to find additional spectrum for existing 12 GHz users, the resolution of these issues is not contingent on international allocation decisions made at RARC-83, nor on subsequent domestic policy decisions in the DBS rule making. If, as the petition suggests, the international spectrum allocation situation changes as a consequence of actions taken at RARC-83, or other subsequent factors arise that prompt the Commission to re-open the 12 GHz allocation decision, the spectrum issue can then be re-opened in the DBS rule making with all due concern for the equities of existing fixed service users.[12] Meanwhile, assuming as we must for present purposes that the U.S. goals will not be frustrated at the RARC-83 conference and that the international spectrum decisions there will be fully consistent with the 12 GHz allocation decision made in the *DBS Report and Order*, any unnecessary delay in the course of the terrestrial rule making could well impede the orderly transition of fixed service users to other bands. Delaying the terrestrial rule making at this time would serve no relevant purpose, but could have a negative influence on the interest of existing 12 GHz users. At the same time, the protections granted existing fixed service users in the DBS proceeding could well give these licensees more protection than that which would be afforded them by the requested delays. As noted earlier, existing terrestrial users will be "grandfathered" indefinitely so long as they cause no interference to operating DBS systems. Furthermore, no terrestrial 12 GHz users will be required to move until five years after the conclusion of the terrestrial rule making. Although not precisely what petitioners requested, these safeguards are designed to protect the public interest in DBS service while also protecting the legitimate interests of the existing fixed service users.

[12] For example, the Commission noted in the *DBS Report and Order* that the fixed service plan may be revisited if the U.S. is not allocated the entire 12.2–12.7 GHz band for DBS at RARC-83. *DBS Report and Order*, n.59.

24. *Compensation of Fixed Service Users.* The Commission has considered fully the compensation issue and is presented with no new facts to alter its previous determinations in this area. The Commission's extensive consideration of the issue is apparent from the face of the *Notice* and subsequent actions in the *DBS Report and Order.* Relying on the record before it and its administrative experience and expertise, the Commission resolved the compensation issue in two basic ways: (1) it adopted several measures to mitigate the costs of relocation, and (2) it sanctioned voluntary compensation arrangements to facilitate relocation and interference-free operation. The Commission concluded, however, that it would not be in the public interest to require DBS licensees to pay the costs of relocating fixed licensees to other bands.

25. The most important of the cost reduction provisions was the establishment of the transition period which will give terrestrial users at least five years in their present operating modes without providing interference protection to DBS users. Thus, those terrestrial users that must relocate will have considerable time to plan for the transition and substantial latitude in timing their move to other bands. This latitude should permit existing 12 GHz users to mitigate to some degree the costs of relocating by coordinating their spectrum shift with such factors as existing equipment lifetimes and other time-dependent considerations. To further reduce transition costs, the Commission ordered the initiation of the terrestrial fixed service rule making that would propose the use of adajacent and lower frequency bands. No additional transmission relay sites would be required at these frequencies, and, at least in the case of moves to adjacent frequencies, much existing 12 GHz equipment can be used with relatively inexpensive modification. Finally, some fixed service users may escape all relocation costs because of the provision to "grandfather" indefinitely all existing fixed service systems that do not cause interference to operating DBS systems.

26. Given these measures, the Commission concluded that in most cases the remaining costs could be be borne reasonably by the terrestrial users. At the same time, it determined that it would not serve the public interest to adopt a system whereby the Commission required DBS users to directly compensate displaced fixed service users, although it did sanction voluntary agreements providing such compensation. It is useful to note in this regard that no licensee of this Commission has a property interest in the use of that spectrum assigned to it, and that in situations such as this neither the Communications Act nor judicial precedent require the Commission

or individual parties benefitted by our actions to reimburse those parties that are adversely affected.[13] However, we believe that private agreements that accommodate the mutual interests of the parties and serve to further our own public interest goals are clearly desirable, and we fully expect that many of the parties will enter such agreements. Proposals that the Commission mandate and supervise such compensation agreements were rejected in part because of their potential for delay, and in part because of the increased administrative burden they would place on the parties and on the Commission. Against this background, the Commission found that it would be better for both the Commission and the affected licensees to simply sanction unsupervised financial agreements. Of course, if extraordinary circumstances arise where Commission intervention is warranted, such cases can be considered as they arise. Because its resources will be called upon only in these special cases, the Commission should be able to address and resolve them in an expeditious manner.

### *IV. Conclusion*

27. In summary, our review of the petition for reconsideration requires that it be denied. To the extent that it requests a stay of Commission action in the *DBS Report and Order*, we find it improperly filed. Alternatively, we find that it does not meet the burden of proof required for us to grant a stay of our actions. To the extent that it lies as a petition for reconsideration, we find that no new facts or arguments are properly raised that would require modification of the Commission decisions addressed. We also note at this point that the petitioner raised no allegation of Commission error in fact or law in the relevant areas that would prompt us to change the outcome of this proceeding on our own motion.

28. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by George Y. Tice on behalf of the County of Los Angeles hereby IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

[13] 47 U.S.C. §301 provides in part: "It is the purpose of this Act . . . to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time." *See also Aeronautical Mobile Services*, 42 F.C.C. 425 (1955).

Discovery
Interlocutory Ruling, Appeal from
Intervention, Request for, Denied
Renewal, of License, Dismissed
Review by Review Board

Review Board denied appeal of dismissal of television renewal application because licensee failed to comply with valid discovery requests and orders. Asserted grounds for non-compliance were previously rejected by Board, Commission, and courts. Also, appeal from dismissal of late-filed petition to intervene is denied because Rule Sec. 1.223 requirements not met.
*–Faith Center, Inc.*
BC Docket No. 82–339

FCC 83R–47

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| FAITH CENTER, INC. | BC Docket No. 82–339<br>File Nos. BRCT-711 and BRCT-801015KE |
| For Renewal of License for Station KVOF-TV San Francisco, California | |
| WEST COAST UNITED BROADCASTING CO.<br>San Francisco, California | BC Docket No. 82–340<br>File No. BPCT-810113KI |
| TOGETHER MEDIA MINISTRIES<br>San Francisco, California | BC Docket No. 82–341<br>File No. BPCT-810115KE |
| LDA COMMUNICATIONS, INC.<br>San Francisco, California | BC Docket No. 82–342<br>File No. BPCT-810115KF |
| For Construction Permit | |

MEMORANDUM OPINION AND ORDER
(Adopted: June 29, 1983; Released: July 7, 1983)

BY THE REVIEW BOARD: BOARD CHAIRMAN MARINO ISSUING SEPARATE STATEMENT.

1. By *Memorandum Opinion and Order* (hereinafter *"Dismissal Order"*), FCC 83M-970, released March 24, 1983, presiding Administrative Law Judge (ALJ) Edward J. Kuhlmann dismissed the application of Faith Center, Inc. for renewal of license of television Station KVOF-TV, San Francisco, California. And, by *Memorandum Opinion and Order* (hereinafter *"Intervention Order "*), FCC 83M-1384, released April 27, 1983, the ALJ dismissed a petition to intervene filed by Lucille E. Johnston. Now before the Review Board for consideration are: (a) an appeal from *Dismissal Order* filed May 23, 1983 by Faith Center; (b) an appeal from *Intervention Order* filed May 27, 1983 by Lucille E. Johnston; (c) opposition to (a) filed June 10, 1983 and an erratum thereto filed June 13, 1983 by Together Media Ministries; (d) opposition to (a) filed June 10, 1983 by LDA Communications, Inc.; (e) opposition to (a) filed June 10, 1983 by West Coast United Broadcasting Co.; (f) opposition to (a) filed June 10, 1983 by the Mass Media Bureau; (g) opposition to (b) filed June 9, 1983 by West Coast United Broadcasting Co.; (h) opposition to (b) filed June 9, 1983 by the Mass Media Bureau; (i) opposition to (b) filed June 10, 1983 by LDA Communications, Inc.; and (j) motion to strike (c) filed June 27, 1983 by Faith Center. For reasons that follow, the Board will deny both of the appeals.

2. *Faith Center's Appeal.* Faith Center's application was dismissed by the ALJ because of its refusal to comply with numerous discovery orders. It has, *inter alia*: (1) never answered interrogatories filed on December 14, 1982 by Together Media Ministries, a competing applicant; (2) failed to produce documents as required by *Order*, FCC 83M-87, released January 7, 1983; (3) not complied with *Memorandum Opinion and Order*, FCC 83M-390, released January 31, 1983, which directed it to answer interrogatories propounded by the Mass Media Bureau and LDA Communications; and (4) failed to produce its principals for scheduled depositions as required by *Memorandum Opinion and Order*, FCC 83M-390, *supra*.

3. Faith Center appeals the dismissal of its application and appears to argue that: (1) discovery orders issued by the ALJ during the pendency of its September 7, 1982 motion to disqualify the ALJ (subsequently denied by the Commission, *Faith Center, Inc.*, 90 FCC 2d 519, 52 RR 2d 1223 (1982) were void *ab initio* and, consequently, Faith Center was not required to comply with them; (2) because the ALJ did not certify to the Commission its second motion to disqualify the ALJ, filed December 14, 1982, and its exception to the ALJ's dismissal of that motion, all of the ALJ's subsequent actions were void *ab initio*; (3) illness of its counsel during December 15–21, 1982 accounts, in part, for some of the procedural delays in this case; (4) it

was not required to answer the December 14, 1982 motion for production of documents and interrogatories propounded by Together Media Ministries because Faith Center's counsel was not directly served with a copy of them on the date they were filed and that, instead, a copy of the interrogatories was sent to Faith Center's co-counsel in another proceeding; and (5) it objected to the Bureau's discovery requests on constitutional and technical procedural grounds.

4. We reject these complaints. With regard to Faith Center's first argument, after the Commission denied its disqualification request on December 10, 1982, the ALJ extended additional time to Faith Center to comply with discovery. *Dismissal Order*, *supra*, at para. 4. Nevertheless, Faith Center has continued to refuse to comply with the ALJ's discovery orders. As to its second argument, we find that the ALJ properly rejected its second attempt to disqualify him because it was frivolously and speciously repetitious of the earlier attempt at disqualification which was denied by the Commission. *See Faith Center, Inc.*, *supra*. Thus, continued refusal to comply with discovery on these grounds is equally impermissible. Its third argument is simply not germane; as pointed out above, Faith Center had been given additional time to comply with discovery but failed to do so, and has not even now indicated a willingness to so comply. *Dismissal Order*, *supra*, at para. 4. Fourth, Faith Center's defective service-of-process argument is rejected as frivolous. It has conceded that "it appears . . . counsel received [the interrogatories] from another attorney, co-counsel in another proceeding, though not this one," Faith Center Appeal, at 6, and that both the interrogatories and the motion for production of documents were "reserved" in mid-January. *Id.*, at 7. Finally, with regard to Faith Center's refusal to fully comply with the Bureau's discovery requests, its resistance to valid discovery requests on constitutional and non-constitutional grounds have already been rejected by the Board, the Commission and the courts. *See Faith Center, Inc.*, 82 FCC 2d 1 (1980), *aff'd without opinion*, 679 F.2d 261 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1188 (1982); *Faith Center, Inc.*, 92 FCC 2d 1255, 52 RR 2d 1547 (Rev. Bd. 1983). *Cf. Scott* v. *Rosenberg*, 702 F.2d 1263 (9th Cir. 1983).*

5. *Lucille Johnston's Appeal.* The petition to intervene filed on April 20, 1983 by Lucille E. Johnston was dismissed by the ALJ because it was late filed, no explanation for the tardiness in filing was provided, and because Ms. Johnston had failed to support her claims with specific allegations of fact. *Intervention Order*, *supra*. Ms. Johnston appeals her dismissal and asserts, in essence, that as an innocent creditor of Faith Center, she has standing to intervene. We

* Faith Center's June 27, 1983 motion to strike the opposition pleading of Together Media Ministries will be denied because the latter pleading was timely filed on June 10, 1983, and because Faith Center has not specifically alleged sufficient facts to support its motion.

shall deny her appeal for the reasons stated by the ALJ and because she has not stated any new grounds not considered by the ALJ that would warrant intervention. Specifically, she has failed to meet the requirements for late intervention set forth in Section 1.223 of the Rules, 47 CFR § 1.223. In particular, she has not explained why she did not seek intervention within 30 days after publication of the hearing designation order and has not shown that her participation would assist in determining the issues in question in this proceeding. *See Golden State Broadcasting Corp.*, 52 RR 2d 1253 (Rev. Bd. 1982); *Washington's Christian Television Outreach, Inc.*, ___ FCC 2d ___ , FCC 83R-23, released March 28, 1983. And, her status as a creditor, standing alone, is insufficient to confer standing as a party in interest. *Arizona Mobile Telephone Co.*, 80 FCC 2d 87 (Rev. Bd. 1980); *Hertz Broadcasting of Birmingham, Inc.*, 46 FCC 2d 350, 352 (Rev. Bd. 1974); *cf. American Telephone and Telegraph Co.*, 7 RR 2d 520 (1966) (shareholder status insufficient to confer standing to intervene).

6. ACCORDINGLY, IT IS ORDERED, That the motion to strike filed June 27, 1983 by Faith Center, Inc. IS DENIED; and

7. IT IS FURTHER ORDERED, That the appeal filed May 23, 1983 by Faith Center, Inc. IS DENIED: and

8. IT IS FURTHER ORDERED, That the appeal filed May 27, 1983 by Lucille E. Johnston IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

## *SEPARATE STATEMENT OF BOARD CHAIRMAN MARINO*

Our action in this case is compelled by the legal authority cited in the Board's order. But this is an occasion to think anew and deeper about such cases. Faith Center is now a step closer to losing its third, and possibly fourth, station for what on the record before us are sound procedural reasons. Perhaps this raging controversy which began with the licensee's good faith assertion of its constitutional rights, *Faith Center, Inc.* , 69 FCC 2d 1123, 1124 (1978), might have been contained if a procedural device had been used which permitted the licensee to obtain a final Court adjudication of its constitutional claims without putting all of its licenses in jeopardy. See authorities cited in my separate statement, *David Hildebrand,* 52 RR 2d 1671 (1983). Past experience teaches that renewal hearings are not the best vehicles for the adjudication of potential constitutional issues. *See, e.g.* , Lamb, *No Lamb for Slaughter* (1963); *Brandywine-Main Line* v. *FCC,* 473 F.2d 16, 27–28 n. 39 (D.C. Cir. 1972); and *Kaye Broadcasters,* 46 FCC 2d 600 (1974). On the other hand, Faith Center decided to litigate and is legally responsible for its bizarre, counterproductive and flawed litigation strategy in this and the companion Los Angeles case. *See Faith Center, Inc.* , 92 FCC 2d 1255, 52 RR 2d 1547 (Rev. Bd. 1983).

Recently, after a preliminary inquiry, the Commission referred a case containing similar 18 U.S.C. 1343 allegations to the Department of Justice for appropriate action. A criminal investigation, followed by possible Grand Jury action and trial in a U.S. District Court, would seem a more appropriate process than a less formal administrative hearing, especially when a licensee pleads its freedom of speech and religion, or Fourth and Fifth Amendment rights. The Commission's recent approach of deferring to other authorities makes much common sense whether the licensee is a controversial preacher accused of soliciting in violation of 18 U.S.C. 1343, an amateur operator alleged to have uttered non-obscene but indecent language, 18 U.S.C. 1464, or a commercial broadcaster who has allegedly conspired to fix prices in violation of the Sherman Act, 15 U.S.C. 1. Similarly, the NLRB is in a better position to resolve unfair labor practice charges against broadcasters. *Community Television of Southern California* v. *Gottfried,* 103 S.Ct. 885, 892–93, and notes 16–17 (1983). But see *Country Broadcasting Co.* , 93 FCC 2d 83, 53 RR 2d 293, 294–5 n.3 (Rev. Bd. 1983), Deferring to other authorities is even more appropriate today because the Commission's limited hearing resources are strained to the limits by matters which are closer to the core of the agency's primary mission set forth in 47 U.S.C. 151.

Comparative Hearing
Equipment, Inspection of
Financial Qualifications, Estimated Costs
Review By Review Board
Settlement
Television Station, Authorization

Review Board affirms Initial Decision, financially disqualifies one commercial VHF television applicant, and grants competing application. Disqualified applicant relied heavily on equipment "on hand," which was in poor condition and was not shown to be functional in quality and adequate in amount, and substantially underestimated its programming costs.

*-GACO Communications Corp.*
*BC Docket No. 80-484*

FCC 83R-44

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| GACO COMMUNICATIONS CORPORATION<br>Houma, Louisiana | BC Docket No. 80-484<br>File No. BPCT-5047 |
| THE WAY OF LIFE TELEVISION NETWORK, INC.<br>Houma, Louisiana | BC Docket No. 80-487<br>File No. BPCT-790622KE |
| For Construction Permit for a New Commercial VHF Television Station | |

*Appearances*

*Vincent A. Pepper, Peter Gutmann,* and *Julian Freret,* on behalf of GACO Communications Corporation; *J. Geoffrey Bentley* and *Joseph P. Benkert,* on behalf of The Way of Life Television Network, Inc.; and *Dennis J. Kelly* and *Alfred C. Cordon,* on behalf of Houma Broadcasters, Inc.

## DECISION

(Adopted: June 10, 1983; Released: June 21, 1983)

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

1. This proceeding currently involves the mutually exclusive applications of GACO Communications Corporation (GACO) and The Way of Life Television Network, Inc. (TWL) for authority to construct a new commercial television station to operate on Channel 11 at Houma, Louisiana. By *Memorandum Opinion and Order,* 45 Fed. Reg. 66866, published October 8, 1980 (hereinafter "*Designation Order* "), the Commission designated these applications for consolidated hearing on a "fair break" religious programming issue against TWL to determine whether that applicant will provide reasonable opportunities for the expression of diverse religious views and on an issue to determine whether operation from TWL's proposed main studio located outside of the Houma city limits would be consistent with the public interest, as well as the standard comparative issue to determine which applicant would better serve the public interest. In the *Initial Decision (I.D.)* , FCC 82D-74, released November 23, 1982, presiding Administrative Law Judge (ALJ), John H. Conlin, provided a short history of this proceeding in which he pointed out that three of the original applications that had been consolidated for hearing by the *Designation Order* had been dismissed, to wit: Houma Broadcasters, Inc. (File No. BPCT-4992), Guaranty Broadcasting Corporation (File No. BPCT-5045), and Greater New Orleans Educational Television Foundation (File No. BPCT-5043). *I.D.* , para. 1. A sixth applicant, Communications Corporation of the South, Inc. (File No. BPCT-5006), was merged into GACO, and Houma Broadcasters was granted party-intervenor status. *Id.* After adding a financial and related issues against TWL, the ALJ found TWL to be financially unqualified and granted the GACO application. *See infra* para. 2 *et seq.* Now before the Review Board for consideration are: (a) exceptions filed January 14, 1983 by TWL (hereinafter "TWL Br."); (b) limited exceptions filed January 14, 1983 by Houma Broadcasters, Inc. (hereinafter "HBI Br."); (c) reply to (a) filed January 27, 1983 by GACO (hereinafter "GACO Br."); (d) reply to (b) filed January 27, 1983 by TWL (hereinafter "TWL Reply"); (e) contingent motion to reopen the record and to enlarge issues filed May 23, 1983 by GACO (hereinafter "GACO Motion"); and (f) motion for extension of time to reply to (e) filed June 6, 1983 by TWL (hereinafter "TWL Motion"). The Board reviewed the *I.D.* in light of these pleadings, the oral argument held March 18, 1983, and the record. We adopt the findings of fact in the *I.D.* , except as modified herein, affirm the ALJ's conclusion that TWL is financially unqualified, and, without reaching the comparative issue, affirm the ALJ's ultimate conclusion that a grant of the GACO application will serve the public interest, convenience and necessity.

*TWL: Financial Qualifications*

2. By *Memorandum Opinion and Order,* FCC 81M-538, released February 25, 1981, the ALJ added a financial issue against TWL;[1] he later added two other issues related to the basic financial qualifications of TWL. *Memorandum Opinion and Order,* FCC 81M-3432, released October 30, 1981.[2] In 9 pages of factual findings, *I.D.* , paras. 11–32, and in several pages of conclusions, *I.D.* , Conclusions, paras. 4–12, the ALJ reviewed the evidence, assessed the testimony and opinions of the witnesses, and thoroughly explicated the record. Based thereon, he found that TWL was not financially qualified. We easily affirm the ALJ's findings and conclusions on this issue. Without reiterating all that is painstakingly laid bare in the *Initial Decision,* we will encapsulate a number of facts and circumstances which clearly corroborate the accuracy of the ALJ's ultimate conclusion on the financial issue.

3. *Construction and Equipment.* TWL proposed to build its new VHF television station with $105,360 and deferred credit in the amount of $49,200 from an equipment supplier, Quality Media Corporation. *I.D.*, para. 12. TWL also claimed that it had its RF generating equipment, its monitoring and test equipment, and some of its program origination equipment "on hand." *Id.* It allocated $2,000 to remodel a building it intends to use for studios,[3] *id.*; and,

---

[1] This issue was:

> Whether the applicant is financially qualified to construct and operate its proposed station.

*I.D.* , para. 1.

[2] These issues were:

> To determine whether TWL has, in pleadings filed during the course of this proceeding, misstated the condition of equipment it has purported to rely on in the construction and operation of its proposed station.
>
> To determine whether TWL failed to comply with an order of the presiding officer to permit entry, inspection and photographing of its equipment.

*I.D.* , para. 1.

[3] Although the building TWL intends to use for studios, *etc.*, was originally built for the now-defunct KHMA-TV (1972–1974), *I.D.*, para. 9, the structure has been used for the past several years, and at the time of the hearing was being used, by the Louisiana Compressor Maintenance Company. *I.D.*, para. 26. A TWL consultant, Robert D. Blazier (*see infra* para. 5) averred that the studio building would not need much remodeling, TWL Exh. 8C at 1, and was "accoustically treated and air conditioned with a high volume, low velocity unit not presently in use." *Id.*

A rather different description of the condition of the building was contained in the testimony of GACO principal, Iddo K. Corkern, a former chief engineer at WBRZ-TV, Baton Rouge, Louisiana (*I.D.*, para. 50). Corkern stated that he had visited the studio building in June 1981, Tr. 915, that it was "very, very dirty, filthy over there," Tr. 916, that the air conditioning plant (obviously critical in a TV studio) had frozen in the past, *id.*, and that the company had given up on it after spending "$1,000 to

although it originally indicated that its antenna system would cost no money, it revised its estimates to $35,000 after assertions by the other parties that the KHMA-TV antenna system was inoperable. *I.D.*, para. 13 & n.10. The very low equipment cost estimates of TWL (totalling, it appears, some $17,600 in certain expenses over and above its antenna system estimates, *see I.D.*, para. 12) were predicated squarely on the applicant's assertion that it already had "on hand" much of the equipment necessary to build and operate a new television station. This assemblage of used equipment, which later became the subject of an abuse of process and an inspection issue against TWL,[4] was acquired by TWL on a gradual basis with, at least, the partial assistance of William Kitchen, president of Quality Media Corporation. *I.D.*, para. 15. TWL's proposed transmitter (formerly belonging to WLCY-TV, Channel 10, Largo, Florida), a tube-type model, was first installed in Florida in 1965; it was dismantled and shipped to Houma in 1979. *I.D.*, para. 24; TWL Exh. 8D.

4. In view of its heavy reliance on its alleged equipment "on hand," the ALJ granted a motion "to permit inspection and photographing" of the material.[5] No TWL principal showed up at the ordered inspection, which was conducted primarily by William B. Carr, a registered engineer. *I.D.*, para. 38. Carr, who was accompa-

---

$2,000 a month trying to keep it operating." *Id.*

What is more, GACO filed on May 23, 1983 a "contingent" motion to reopen the record and enlarge the issues on the basis of an affidavit of Ronald R. Cannon, president of Louisiana Compressor Maintenance Company, the owner of the building TWL intends to use as a studio. In the affidavit, Cannon asserts that its agreement with TWL expired on May 21, 1982, that an eviction order was issued on September 16, 1982 requiring TWL to remove its trailer, and that:

> If TWL represents that it can continue to rely upon the availability of its proposed studio site, such representation is incorrect. The property is for sale to any party.

GACO Motion, Affidavit at 2.

TWL responded on June 6, 1983 seeking more time to respond and noting that GACO's "motion recites alleged facts which supposedly have been public knowledge since August 30, 1982. . . ." TWL Motion, at 2. It does not contest GACO's allegations: it merely states that a further hearing would consume several months.

Because we have found TWL financially disqualified, and because GACO's motion is merely "contingent," neither motion need be ruled upon. However, had any serious question remained concerning TWL's financial disqualification, this matter would require further evidentiary exploration since TWL's proposal is inextricably tied to its ability to secure renovated television studios at a negligible initial cost and a monthly rental of $2,000.

[4] *See I.D.*, paras. 33–39; Conclusions, paras. 13–18. These subsidiary issues are addressed *infra*, paras. 21–24.

[5] FCC 81M-1342, released May 4, 1981. The subsequent issue designated to determine whether TWL actually complied with the inspection ordered by the ALJ is reprinted at note 2, *supra*.

nied by principals of the other applicants (*id.*), found the used equipment stacked haphazardly in a trailer and in a warehouse. *I.D.*, para. 39.[6] Although some portion of the used equipment was inaccessible, *id.*, Carr testified with respect to the equipment he could access: he described it as in "extremely poor condition," with "parts broken off, components damaged, tube sockets broken. . . ." *Id.* (*quoting* Tr. 823). Carr also observed "evidence of broken meters, broken pieces, this type of thing." *Id.* (*quoting* Tr. 824). On the basis of his entire inspection, Carr concluded that there was not enough equipment to operate a television station (even assuming that the used equipment worked), *id.*; of particular and critical importance was TWL's complete lack of a diplexer which is that vital piece of equipment necessary to combine the audio signal with the video signal and to feed the sound and pictures simultaneously to the antenna system. *I.D.*, para. 19; Tr. 864. A station without a diplexer could be either a sound station or a picture station, but not a television station as we have come to know television. Carr testified that a diplexer would add $30,000-$40,000 to TWL's costs.[7]

5. To support its equipment "on hand" claim, TWL offered the statement of Robert D. Blazier, coordinator of instructional television at Nicholls State University, who visually examined the equipment.[8] Blazier submitted written testimony in which he "found the [TWL] equipment usable for television broadcasting program origination." *I.D.*, para. 17 (*quoting* TWL Exh. 8). But, at hearing and upon cross-examination, Blazier's written endorsement of the equipment withered away: he conceded (1) that in describing the equipment as "usable," he meant only that it was the type of equipment he was familiar with at television stations, *I.D.*, para. 17; (2) that although he inventoried the equipment and advised TWL of additional equipment it would need, he made no qualitative analysis of

[6] The photographs taken at the inspection are arrayed as GACO Exhs. 11A-Q. As did the ALJ, *see I.D.*, para. 18, we have examined those exhibits and the testimony related thereto (Tr. 829–63) and confirm the descriptions related by the ALJ and Carr.

[7] Tr. 864. Janis Graves, a TWL principal, says she was assured that a diplexer was part of the transmitter purchased in Florida. Tr. 995–96. But, the individual who shipped the transmitter and proposes to install it, Bruce E. Singleton, a former engineer at WLCY-TV, could not recall whether a diplexer was shipped with the transmitter and stated that the written inventory of parts supplied with the transmitter did not specify a diplexer. Tr. 662. Moreover, even if a diplexer had been shipped as part of the WLCY-TV transmitter, it would seem that any such diplexer would have to be converted from Channel 10 (WLCY-TV's frequency) to Channel 11 at a substantial cost. See related discussion of the necessity to convert the WLCY-TV transmitter itself at para. 9, *infra*.

[8] Blazier has no experience in commercial television and is not a registered engineer; neither does he have an electrical engineering degree nor an FCC First Class License. Tr. 289–90. He did, however, assist TWL in preparing its application, *I.D.*, para. 38, and was present at the inspection solely to unlock the doors to the trailer and warehouse. Tr. 294–95.

the equipment "on hand" nor did he test any of it for electronic performance, *id.*; and (3) that the equipment was 15–16 years old, had not been used in 10–11 years, and was tube-type—therefore needing more maintenance than solid-state and more susceptible to deterioration from lack of use. *Id.* Hence, Blazier testified that he did not know if the equipment would work. *Id.*[9] He did not know whether TWL had ordered other necessary equipment such as a studio-transmitter link. *See generally* Tr. 304–306. And, he noted that other program origination equipment would have to be ordered. *See* TWL Exh. 8C. GACO supplied the views of Horace W. Gross, president of Frazier, Gross & Kadlec, Inc., a Washington, D.C. broadcast consulting firm.[10] After reviewing TWL's equipment list (TWL Exh. 8), he found that TWL had neglected such basic items as "tools, fire extinguishers, lamps for the studio lights and camera equipment for the news department with facilities for editing tape or processing news film."[11]

---

[9] Blazier's "expertise" on the TWL equipment can be gleaned, in part, from the following exchanges:

> Q. So, your knowledge of this equipment is based on representations made by others, you did not feel it necessary to personally check out the equipment.
>
> A. No.

Tr. 297.

> Q. You can't tell whether it will work through a visual inspection.
>
> A. No.
>
> Q. The answer is that you cannot tell.
>
> A. I cannot tell.

Tr. 300. Although Blazier conceded that his knowledge of the operability of the equipment was based on the representations of others, he answered:

> Q. Have you ever dealt with a company known as Quality Media Corporation before?
>
> A. Not personally, no.

*Id.*

[10] *I.D.*, para. 20.

[11] GACO Exh. 8, at 2. Gross further opined:

> TWL has proposed all used equipment. Spare parts will be needed to maintain the equipment. The only provision for this item is an old list of spare parts associated with the transmitter and a canabalized [sic] studio camera that can be canabalized [sic] further to maintain the studio cameras. It is not possible to ascertain from the list of transmitter spare parts whether there are adequate tubes and parts for normal maintenance. Nor is it possible to determine if there are sufficient spare parts remaining to maintain the studio cameras. No spare parts have been provided to maintain the film camera and projectors which will receive heavy use. Because all of the equipment to be installed by TWL is used equipment, a greater than average quantity of spare parts will be needed to place

6. The president of Quality Media Corporation, William Kitchen, asserted that the equipment "on hand" was in working order at the time of initial acquisition, based upon personal inspection or reports of his subordinates. *I.D.*, para. 16. However, the equipment collection, accumulated gradually since 1977, was never tested to see if these variously acquired components functioned as a system. *Id.* Indeed, Kitchen himself had not inspected the equipment since it was moved to Houma from Monroe, Louisiana and stored in a trailer; nor was he familiar with the conditions of the storage of the equipment. *Id.* And, although Kitchen made a representation that he would remedy "any problems that could be determined to have been caused by the condition of the equipment when I purchased it," Tr. 590, he would not vouchsafe that the equipment would work.[12]

7. TWL's antenna system and proposed tower were also the subject of focus.[13] Whereas TWL initially specified no funds for rehabilitating the former KHMA-TV antenna system and tower, *I.D.*, para. 13 & n.10, and, in fact, represented in a 1979 amendment to its application that its antenna system was "on hand," *I.D.*, para. 34, it submitted an exhibit nearly one-and-a-half years later (on June 1, 1981) which confessed that it could "no longer presume that the

---

the station in operation and maintain it for three months. A reasonable budget for these spares for the initial operation and the first three months would be $3,000.

*Id.*, at 2–3.

[12] Kitchen testified:

Q. What is your obligation in terms of making the Commission— the equipment operable?

A. We did not make any statements as to warranty on the equipment. What I do is, when a large amount of equipment is installed, is we talk to the engineers. We find, if there was any misrepresentations on our part, whether actual or assumed by the customer, we try and make it right.

Tr. 589.

Q. Is it your testimony now that all the equipment which was purchased or acquired through you would be made operable at your expense?

A. No, I did not say that I would make it operable.

Q. I didn't—I'm not—I'm asking you would you make all the equipment provided by you to date to TWL operable at your expense or operative at your expense?

A. What you're asking me to do here is difficult because I'm stating in public record that I'm obligating myself to my customer for something which I didn't represent initially that I would do.

Tr. 590.

[13] The discussion here is limited to the costs related to bringing these equipment components up to operational level. The availability and costs associated with TWL's specification of the tower and transmitter site of the defunct KHMA-TV—now 50% owned by a GACO principal—is discussed more fully at paras. 10–14, *infra*.

transmission line and antenna mounted on the tower are in operable condition. . . ." *I.D.*, para. 35 (*quoting* TWL Exh. 8 at 1–2).[14] It amended its financial showing by specifying $35,000 to make the antenna system operable. *I.D.*, paras. 12–13. GACO challenged TWL's antenna syste financing as woefully understated: it offered the opinion of consulting engineer Richard L. Biby, who estimated a minimum of $100,000 to rehabilitate the tower and antenna plus $25,000 to replace the coaxial cable connecting the studio and the transmitter. *I.D.*, para. 14. Biby's estimate is based, in part, on the on-site inspections conducted in 1976 by R.C. Cornforth Associates, a firm specializing in structural analyses of towers, and by Dean W. Sargent Broadcast Service. *Id.*[15] Biby stated that the tower has had no maintenance since 1976 and has, therefore, probably deteriorated even further because of high winds and semi-salt water. *Id.*

8. TWL's assessment of the tower was offered by William Kitchen who claimed that he had visited the tower in 1977, found it in "very good condition," and opined that it should be serviceable for many years if "properly taken care of" by "routine painting and the things that go along with the tower."[16] However, Kitchen does not

---

[14] This belated concession and TWL's amendment led to the designation of the abuse of process (*cum* misrepresentation) issue set forth in note 2, *supra*. The ALJ's discussion of the issue is found at *I.D.*, para. 34 *et seq.*; our review of that issue is found at paras. 21–23, *infra*.

[15] GACO Exh. 12 contains, *inter alia*, a letter of December 10, 1976 in which, after inspecting the tower, R.C. Cornforth stated that the tower "appeared to be in good shape" but that the guy cables and anchors were not. Also contained is a November 1976 report from Dean W. Sargent who said that the tower was rusting even then, but that the antenna condition was "good" at that time.

The exhibit incorporating the Cornforth and Sargent reports is prefaced by the notarized statement of Biby, executed on December 10, 1980, which contends that, based upon the Cornforth and Sargent reports and upon telephone conversations with them, "a reasonable approximation of the costs of performing only such rehabilitation work as normal prudence and insurance requirements [insurance policy reference deleted] dictate is in excess of $100,000.00." Although the Cornforth and Sargent discussions alleged by Biby are hearsay and neither person was presented at hearing for cross-examination on their reports, hearsay evidence is not necessarily precluded in administrative proceedings. *National Ass'n of Recycling Industries* v. *FMC*, 658 F.2d 816, 825 (D.C. Cir. 1980); *see generally* K. Davis, *Administrative Law of the Seventies*, §14.00, at 338 (*citing* FCC Rule §1.351 which allows for relaxation of the Federal Rules of Evidence); §14.11, at 340 (1976). *But see United Broadcasting Corp.*, 53 RR 2d 57, 80 n.114 (1983) (hearing exhibits relating to financial showing properly rejected by ALJ as hearsay). However, Biby did testify, *see* Tr. 935–53, was cross-examined, *id.*, and TWL has neither impeached Biby's testimony nor offered its own tower rehabilitation cost estimates. Finally, TWL did not seek to subpoena Cornforth or Sargent. *See Richardson* v. *Perales*, 402 U.S. 389, 402 (1971) (physician's report "may constitute substantial evidence supportive of a finding by the hearing examiner" where adverse party did not exercise right to subpoena physician for cross-examination).

[16] Tr. 546, 548. Kitchen is neither a structural engineer nor an electrical engineer. Tr. 546.

perform any of the work on rehabilitating transmission lines or tower antenna systems and he had not contacted any of his local subcontractors who do such work to obtain estimates of the potential cost of rehabilitation.[17] Moreover, although Kitchen had previously emphasized the importance of tower maintenance in assuring structural integrity, he testified as follows at the November 1981 hearing:[18]

> Q. Do you know what maintenance has been performed on the KHMA-TV tower since you visited that site in 1977?
>
> A. I believe there's been practically none.

Furthermore, in its arguments asserting that the hypothetical $2,000 per month it would pay as rental to the owner of the KHMA-TV tower and transmitter site is reasonable, TWL argues that the land value of the 10 acres on which the tower is situated is low and:

> . . . according to documents filed with the Federal Communications Commission by CCSI [the land owner], the tower is in poor condition. Therefore, to assign it [land, transmitter building and tower] a value of $122,000 for . . . determining the property's fair rental value is at least reasonable, if not generous.

TWL Exh. 8 at 4.

9. With regard to the transmitter and transmitter site, the following appears. As noted *supra*, TWL's proposed transmitter was formerly used by WLCY-TV, Largo, Florida where it was installed in 1965 to operate on that station's frequency, Channel 10. Because the frequency here at contest in Houma is Channel 11, the transmitter must be converted to operate on the higher frequency. GACO submitted an estimate of approximately $90,000 for the conversion, such estimate being provided by E. Noel Luddy, manager of consultant relations for RCA.[19] The ALJ adverts to RCA's estimate in his conclusions;[20] however, TWL retorts that a GACO witness, Horace W. Gross, stated "that the cost of converting the transmitter could be as little as $440."[21] Thus, although TWL implicitly recognizes that its transmitter must be converted (at a cost, apparently, of between $440 and $90,000), it has specifically earmarked no funds for the conversion in its budget, *see I.D.*, para. 12; it furnishes no reasonably firm estimate of its own for the conversion; and, it does not indicate where the funds will come from if the actual transmitter conversion costs are closer to RCA's $90,000 estimate. Moreover, while TWL has budgeted $13,260 for the physical installation of the transmitter, *see id.*, the individual installing the

---

[17] Tr. 586.

[18] *Id.*

[19] GACO Br. at 3 (referencing GACO Exh. 14). The TWL transmitter model is an RCA TT35. Tr. 648.

[20] *I.D.*, Conclusions, para. 10.

[21] TWL Br. at 30 n.14 (referencing GACO Exh. 8).

transmitter, Bruce E. Singleton, nowhere indicated that he would make the required conversion. *See* Tr. 646–674. Indeed, although Singleton expressed his belief that the transmitter was in generally good shape, *I.D.*, para. 24, he specifically noted that his obligation did not include completion of the final proof of performance, or the execution of the forms attendant thereto. *Id.* Moreover, Singleton's installation estimate and contract did not include the time or measurement equipment necessary for equipment performance measurements and he did not know if TWL had the requisite measurement equipment on hand.[22] Nor would Singleton take responsibility for replacing inoperative parts.[23][24]

10. A vigorous legal debate is presented over TWL's proposed tower and transmitter site and its allocation of a hypothetical $2,000 per month rental for that site. As indicated *supra*, TWL has specified the tower and site of the former KHMA-TV, which facilities are now "owned by The Vanderbilt Corporation, the corporate parent of CCSI, which in turn owns 50% of GACO."[25] The present owner paid $100,000 for the site in 1976,[26] has refused to rent the site, but says that it will sell it outright for $250,000.[27] TWL has never inquired of Vanderbilt as to the availability of the site;[28] and, its allocation of $2,000 per month for rental of the site is based exclusively upon its somewhat solipsistic view of a reasonable rate of return to the property owner.[29]

11. TWL contends that it may specify the site owned (50%) by its opponent by dint of the policy espoused in *George E. Cameron, Jr. Communications*, 71 FCC 2d 460 (1979) ("*Cameron*") and amplified in

---

[22] Tr. 652–53.

[24] Additionally, although Singleton's cost estimate for the physical installation of the transmitter was apparently based upon a 36-day installation period, *see* Tr. 651, 670, he refused to guaranty his estimate because of the "variables" associated with installation such as the condition of the transmitter building. *Id.* But, the state of the TWL transmitter building (used by KHMA-TV until 1974) is doubtful. The *Initial Decision* relates that its condition was described as "extremely poor, the door was ripped open, snakes and cattle had been in and out of the building and everything was in a state of disarray including the electrical system." *I.D.*, para. 22. Another witness' description reflected that the building "was in a state of disrepair with doors open, wiring and circuit breakers cannabalized and no sign of a water supply for cooling purposes." *Id.* In its brief, TWL does not challenge these descriptions; and, Singleton has not been to Houma to inspect the transmitter, Tr. 654, or the transmitter building. Tr. 664. Finally, Singleton had not personally tested the WLCY-TV transmitter prior to its being dismantled in 1977 to determine if it was in operating condition even then. Tr. 668–69.

[25] TWL Br. at 6; *see also I.D.*, n.11.

[26] *Id.*, at 7 (referencing Tr. 960).

[27] *I.D.*, para. 27; Conclusions, para. 5.

[28] Tr. 966.

[29] TWL Exh. 8 at 4–5.

*New Continental Broadcasting Co.*, 45 RR 2d 1632 (1979) ("*New Continental*").[30] It claims that those cases establish a "conclusive presumption that applicants may specify the tower facilities of deleted stations . . . with a reasonable assurance that those facilities will be available to the applicant who emerges successful at the conclusion of the hearing."[31] In *Cameron*, the Commission announced a novel policy, the effect of which was to allow a license renewal challenger to specify the site of its opponent, the incumbent licensee; this approach was intended to preclude the incumbent from contumaciously eliminating an otherwise (possibly) viable applicant by refusing the challenger the future use of its site.[32]

12. GACO counters that *Cameron* is a comparative renewal case and thus distingushable because there is present here no "incumbent" to unfairly obstruct a "challenger."[33] It claims that the "narrow exception"[34] carved by *Cameron* to the general rule that an applicant must show the availability of a transmitter site is inapposite where "the property owner is not an incumbent, the site is not presently [sic] used for broadcasting and four of the other original applicants in this proceeding specified other sites which they found to be both suitable and available."[35] However, while GACO cites to *New Continental* in its brief,[36] it conveniently overlooks—disingenuously, we believe—the fact that that later case expressly extended *Cameron* to a situation in which one of the new applicants had privately acquired the site of a deleted radio facility (the former WFAB, Miami, Florida). The Commission found in *New Continental* that an applicant's stated refusal to make the site available to current competitors was "highly premature,"[37] and it

[30] TWL Br. at 22–25.

[31] *Id.* at 23. *But see Belo Broadcasting Corp.*, 88 FCC 2d 922, 926 n.19 (1981) where the Commission explained:

> Although the term 'conclusive presumption' was used, the intent of *Cameron* was to hold in abeyance all considerations relating to a challenger's transmitter site until a final determination can be made as to which applicant would best serve the public interest.

[32] *See Cameron, supra*, 71 FCC 2d at 466–67. However, *Cameron* may not be directly on point here because the site owner has *not* refused to make the site available. Rather, it has expressly represented that it would sell the site to TWL. But, TWL has refused to pay the initial asking price and has not even negotiated. Moreover, it has not been shown that TWL could pay even the $100,000 that the land sold for in 1976, let alone its current fair market value; and TWL does not say that it could or would. It merely pushes its right to rent the site at a hypothetical monthly amount. Nonetheless, nothing in the law would require GACO—if it lost this contest—to retain the land for TWL's benefit.

[33] *See* GACO Br. at 10.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] 45 RR 2d at 1633.

permitted the other applicants to also specify the former WFAB site "given the fact that towers, transmission facilities and other equipment are already located there, making broadcasting its logical use."[38] The situation in *New Continental* was, therefore, virtually identical to that at bar and is, to that extent, controlling.

13. Nonetheless, it is salient here to note that the issue before the ALJ and the Board is not, as it was in *Cameron* or *New Continental*, an ordinary "site availability" issue. Rather, the matter of TWL's specification of the KHMA-TV site and its hypothetical $2,000 per month rental arises within the context of a larger financial issue and, in that connection, the law is dictated by the later case of *Belo Broadcasting Corp.*, *supra* note 31, where the Commission clarified the *Cameron* doctrine by deleting a "site availability" issue against a renewal challenger and "deferring all questions concerning site availability until completion of the hearing."[39] In that regard, the Commission held that the *Belo* challenger was expected to demonstrate "its contingency planning in case [its competitor's] sites remain unavailable."[40] Here, the hearing has expired, TWL has yet to even query the property owner as to the availability of the KHMA-TV site or the potential cost to it (purchase or rental), and it has indicated no "contingency planning" whatever.

14. In *Belo*, Commissioner Quello concurred as being bound by the *Cameron* doctrine, but remarked:

> I am now concerned, however, that full implementation of the *Cameron* policy, plus its extension into areas outside the renewal context, may cause procedural and substantive problems which were not immediately apparent.

88 FCC 2d at 930 (footnote citing to *New Continental* deleted). The Commissioner's apprehensions appear prescient in consideration of the facts of this case. Yet, applying *Belo* as we understand it—as apparently did the ALJ (*see I.D.*, Conclusions, para. 5)—the current state of the law is this: (1) TWL was permitted to specify the KHMA-TV transmitter site (*qua* site) which is 50% owned by GACO principals; but that (2) TWL was nevertheless required to satisfy the larger financial qualification issue by showing ample resources for the site specified or "contingency planning" in the event that the specified site eluded it. Our understanding of *Belo* is reinforced by

[38] *Id.* Moreover, the Commission also held that if the applicant/site-owner continued to refuse to make the site available to the ultimately successful competitor, the winning applicant could later modify to specify an entirely new site. *Id.*, at n.2. TWL points to this ability to later modify a site proposal if an opponent's site remains unavailable. TWL Br. at 24–25 & n.13. However, as discussed more fully in the succeeding textual paragraph, while an applicant may specify a later site where there are *no* questions about its *basic* financial ability (as is true with most applicants), and the *only* remaining question is whether it will have *any* site at all, it is simply the deferral of any "site availability" issue that is permissible. There is, though, no "site availability" issue here; there is, rather, a basic financial issue.

[39] 88 FCC 2d at 926.

[40] *Id.*, at 927 n.27.

*Kaye-Smith Enterprises*, 90 FCC 2d 105, 108 (1982), where an applicant relying on *Cameron* specified the site leased by its incumbent opponent. But, in its financial showing, it estimated a hypothetical $1,000 per month lease cost without inquiring of the property owner. Accordingly, the Commission held that "this matter must be explored at hearing to determine the basis and actual cost of leasing the site" within the context of a general financial issue also specified against that applicant. Hence, while a competing applicant's site itself may be specified, the specifying applicant must nonetheless demonstrate the basic financial ability to acquire *some* site—its opponent's or a reasonable substitute.

15. *Programming.* TWL proposes to operate for the first 3 months by spending only $24,465 in salaries, *I.D.*, para. 25,[41] and $13,070 for programming. *Id.* Although the Commission had designated a so-called "fair break" programming issue against TWL to determine whether it would provide "reasonable opportunities [to] representatives of religious faiths which do not share the religious beliefs of the applicant . . .,"[42] TWL averred at hearing that although religious programming will be broadcast, it proposes, in fact, a general market format. *I.D.*, para. 4. But, while it proposes a general market format, its programming budget (over and above local) is only $115 per day. *I.D.*, para. 29. It proposes to acquire a substantial amount of "barter" programming to fill its schedule. *Id.*

16. TWL anticipates that, with the exception of its chief engineer and its news director, it will pay its other employees minimum wage for the first 3 months, *I.D.*, para. 28, and will rely on 3 student interns who will work 20 hours per week each, 1 in news and 2 in production. *See id.*, at paras. 25, 28. According to the TWL brief, "TWL's salary estimates were based on consultations with Charles Chatelain, general manager of Station KADN-TV, Lafayette, Louisana."[43] Although Chatelain did not appear as a witness, his estimates

[41] Its salary projections are:

*Salaries*

| | | | |
|---|---|---|---|
| General Manager | $ 0 | Technical Operator | |
| Program Director | 0 | (6 full time or equivalent) | 11,600 |
| Sales Director | Commission only | Interns | |
| Salesman | Commission only | (3 at 20 hours/week; | |
| Chief Engineer | 6,000 | 1 News and 2 production) | 2,900 |
| | | News Director | 3,000 |
| | | Secretary (20 hours/week) | 965 |
| | | Subtotal | $24,465 |

TWL Exh. 8 at 3–4.

[42] *I.D.*, para. 1 (referencing *Designation Order*, FCC 80–534, released September 30, 1980).

[43] TWL Br. at 8 (referencing TWL Exh. 8 at 5). However, that part of the exhibit adverting to alleged consultations with Chatelain was apparently stricken by the ALJ when Chatelain did not appear for cross-examination. *See* Tr. 564–66. We

were generally supported by William Kitchen.[44] Kitchen was also TWL's witness on program cost estimates.[45] However, when asked whether, in preparing his "testimony on programming available to the proposed station in Houma," he had studied the market, Kitchen replied that he hadn't;[46] in fact, he did not even know what perish (county) Houma was in.[47]

17. TWL's $115 per day allocation for syndicated programming and films, *etc.*, is based on its belief that some programs are available at a cost of $25 per episode and $20 or less for motion pictures. *I.D.*, para. 29. These cost estimates rest, in turn, on the evident assumption by TWL that Houma is considered a separate, small program market by program suppliers who price their programs according to whether the station's television market is within a larger ADI or is outside an ADI. *See I.D.*, Conclusions, para. 6. ADI's are established on a county basis. Despite this assumption, the record is conclusive that Houma is part of the New Orleans ADI, *id.*, a fact admitted by TWL's witness, William Kitchen.[48] GACO's witness, Horace W. Gross, a TV management consultant, testified that, based upon applicable standards, Houma could not be established as a separate market, *I.D.*, para. 30; and, that even if TWL tried to have Houma established as a separate market outside the New Orleans ADI, the process for making the showing necessary to change Houma's ADI status would take at least a year because it involves intensive diary-keeping by the audience rating service that establishes ADI designations. *Id.*[49] TWL's witness, Kitchen, stated that he had no idea whether Houma could ever be established as a separate market for purposes of costing programming and that the cost of programming to TWL would be "prohibitive" if it could not.[50]

---

believe that the striking of alleged reliance on Chatelain may have been inconsistent with the ALJ's failure to strike GACO's reliance on tower experts Cornforth and Sargent, neither of whom appeared at hearing for cross-examination. *See* Tr. 944–51; and also see our brief discussion of hearsay evidence in note 15, *supra*. In any event, the handling of the Chatelain estimates is harmless and the validity, *vel non*, of those estimates plays no part in our review of TWL's financial qualifications.

[44] TWL Br. at 8 n.7 (referencing Tr. 592–93).

[45] Tr. 566–71.

[46] Tr. 573.

[47] *Id.*, at 573–74. The question of which parish (county) Houma is in looms pivotal since TWL's $115 per day estimated programming cost is predicated on the erroneous assumption that Houma is a separate programming market and that its county is not one of those within the New Orleans ADI. See discussion *infra* at next textual paragraph.

[48] Tr. 573.

[49] Gross also testified that TWL had made no provision in its programming budget for such basic expenses as down payments and advance payments for film suppliers, materials to produce local programming such as film stock, slide materials, sets and "flats," news gathering costs, or for advertising and promotion, *etc. I.D.*, para. 31.

[50] Kitchen testified:

18. *Summary.* Although the Commission gives great latitude to an applicant in projecting its financial qualifications,[51] and currently requires that an applicant need initially only certify that it has sufficient resources to operate for the first 3 months without operational income, *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 50 RR 2d 381, 382 (1981) (*"Revision of Form 301"*), a financial issue may be designated for hearing where a *prima facie* case is made that significant and material questions of fact exist as to the validity of the applicant's financial qualifications. *See* 47 U.S.C. §309(e); *see also United Broadcasting Co.*, 53 RR 2d 57, 78 & n.101 (1983).[52] An issue is proper where serious questions arise as to whether an applicant's proposal is capable of effectuation. *Thunder Bay Broadcasting Corp.*, 49 FCC 2d 1023, 1028 (1974). And, although an applicant may now initially certify on the revised Form 301 that it has its construction and financial resources, the Commission stated when revising the form:

> At the outset, it should be emphasized that we are not, in any way, modifying the underlying substantive financial criteria.

*Revision of Form 301, supra*, 50 RR 2d at 382. *See also United Broadcasting, supra*, 53 RR 2d at 78 n.101; *Kaye-Smith Enterprises, supra*, 90 FCC 2d at 108–10 (1982).[53]

19. Relying on *Thunder Bay, supra*, TWL excepts to the ALJ's close analysis of its equipment and finances and asserts that it is the Commission's policy to show deference to an applicant's determination of the resources it intends to rely upon.[54] It also relies on the

---

> Q. Do you have any personal knowledge of whether the Houma television market would be a separate market from the New Orleans television market of which it is now a part?
>
> A. Because of the number of households and the distance from the city, if I were the station owner, I would certainly attempt to establish, and I believe, sir, that your people would too—otherwise you would find the cost of programming prohibitive.
>
> Q. Yes, sir, that's exactly right. And do you have any knowledge of whether they would be successful in establishing Houma as a separate television market?
>
> A. No, sir, I do not.

Tr. 606.

[51] The Commission's authority to inquire into financial qualifications germinates from Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. §308(b).

[52] In *United Broadcasting*, the Commission affirmed the financial disqualification of an applicant, 53 RR 2d at 79, after the Review Board had added an issue because the applicant had originally indicated that it had sufficient used equipment "on hand," but later admitted that it did not. *See id.*, at 78.

[53] In *Kaye-Smith*, and despite the policy relaxation announced a year earlier in the *Revision of FCC Form 301* to allow for self-certification of financial resources, the Commission added a financial issue against an applicant who had alleged $489,123 to construct and operate a new FM station because the applicant's (undated) financial statement did not establish the liquidity of its stock or real estate interests nor did it contain a verification of alleged "cash due." *See* 90 FCC 2d at 109–10.

*Revision of Form 301, supra*, for the proposition that "a party taking issue with [an applicant's] determinations bears a particularly heavy burden."[55] Finally, TWL intimates that inasmuch as its proposals were "reasonable in their inception," the ALJ's findings were not supported by substantial evidence.[56]

20. TWL's approach to the financial issue is backwards. Even if we were to agree, *arguendo*, that its proposals seemed "reasonable in their inception,"[57] once a financial issue is designated against an applicant, the applicant bears the burden of proof on the issue. The burden of proof on the financial issue was expressly placed on TWL. *I.D.*, at n.7.[58] TWL's formulation of the operable dynamics would place that burden somewhere else —perhaps on the ALJ. Moreover, TWL's reliance on *Revision of Form 301* is fatally misplaced; both *Kaye-Smith* and *United Broadcasting, supra*, decided *after* the form

[54] *See* TWL Br. at 26–27. TWL cites the Commission's language in *Thunder Bay* which stated that it would not:

> . . . publish with each finding of financial qualification a catalogue of prices for every fixture or item of inventory in a television station. Doing so would ignore the judgment of the applicant and infringe upon the applicant's prerogative to apply ingenuity and flexibility to devise the best practicable service for its community of license.

*Id.*, at 26, *quoting* 49 FCC 2d at 1028 (footnote omitted).

[55] *Id.*, at 26–27.

[56] *In haec verba*, TWL contends:

> It is pertinent to observe here that findings in administrative hearings governed by the Administrative Procedure Act must be 'supported by and in accordance with reliable, probative and substantial evidence.' 5 U.S.C. § 556(d) (1976). *See Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1140–41 (Rev. Bd. 1982) and cases cited therein.
>
> TWL's proposals were reasonable in their inception. They were based on consultations with managers of other television stations, TWL's equipment supplier, its counsel and the contractors it was engaging to do the work. . . . The record demonstrates that GACO's evidence was not sufficiently reliable, probative or substantial to cast doubt on the ability of TWL to effectuate its proposals.

TWL Br. at 27.

[57] Agreeing with TWL on this point would take considerable effort and constrain us to ignore TWL's own admissions that its proposals were not "reasonable in their inception." To wit, not only was TWL compelled to amend its application by adding $35,000 for antenna system costs in response to allegations and data supplied by others, *I.D.*, para. 13 & n.10, and to concede that it could no longer rely on its original assumptions with respect to its equipment "on hand," *id.*, at para. 35, it states in response to the abuse of process issue that its actions regarding initial equipment representations were:

> . . . at the worst, carelessness, exaggeration, puffing, slipshoddiness, or other similar behavior which is not a basis for disqualification [for misrepresentation].

TWL Reply, at 4. We doubt that an applicant's initial representations can be thus characterized and yet be considered "reasonable."

[58] This situs of the burden on the applicant is consistent with 47 U.S.C. § 309(e) and Commission precedent. *See, e.g., United Broadcasting, supra*, 53 RR 2d at 81.

relaxation policy was announced, attest to the fact that an applicant questioned as to its financial qualifications cannot merely "certify" those questions away as TWL's brief necessarily implies.[59] In this case, not only did TWL not meet its burden of proof on this issue (and we affirm the ALJ on his finding and conclusions thereunder) the "reliable, probative and substantial evidence"[60] shows—if anything—that TWL is not financially qualified to be licensed.[61]

*TWL: Abuse of Process*

21. *Misstatements Re Equipment.* In its application filed on December 31, 1979, TWL represented that it had "on hand" all of its antenna system, its RF generating equipment, its monitoring and test equipment, and its program origination equipment, *I.D.*, para. 34. Again, in an affidavit filed on December 1, 1980 (opposing an enlargement of issues motion challenging TWL's financial and equipment representations), TWL asserted that it had "on hand the necessary equipment to begin operation of a television station." *Id.*, at para. 35 (*quoting* GACO Exh. 10, at 3). Nevertheless, in a *volte-face* not satisfactorily explained to this day, TWL—facing a financial issue and a personal inspection of its purported equipment[62]—reversed its unqualified position just one week prior to the commencement of the hearing and, on June 8, 1981, admitted that it could no longer presume the operability of its transmission system and that other equipment was also needed. *Id.*

22. The foregoing sequence of events creates the unavoidable suspicion that TWL lacked candor regarding its equipment and the ALJ's addition of the "misstatement" issue based on the allegations before him was more than justified. After taking testimony and other evidence under the issue, the ALJ concluded that it was "conceivable" that TWL "believed until the eve of the hearing" that its equipment was as it originally envisaged. *I.D.*, Conclusions, para. 17. While we will not go so far as the ALJ and say that the record contains "no evidence" of deliberate overstatement (*id.*) in view of the fact that the other parties, very early on, made creditable allegations regarding the insufficiency of TWL's equipment, some of

[59] *See* TWL Br. at 27. *But see South Florida Broadcasting Co., Inc.*, FCC 83-265, released June 2, 1983 (applicant may not merely certify to financial qualifications where substantial and material questions of fact exist).

[60] TWL Br. at 27, *quoting* 5 U.S.C. § 556(d) (1976).

[61] Although it is said that all comparisons are invidious, it is ironic that in the case heavily relied upon by TWL, *Thunder Bay*, the television applicant there proposed to operate in the first year in reliance on a $400,000 bank loan and $600,000 worth of leased equipment. 49 FCC 2d at 1025. That proposal was made in 1972. *See id.*

[62] The financial issue had been added on February 25, 1981. *See* para. 2, *supra*. The ALJ's inspection order had been released on May 4, 1981. *See* para. 4 & note 5, *supra*.

which allegations TWL later admitted, we do agree that a potential finding of an intentional lack of candor is not supported by substantial record evidence.

23. TWL's shuffling regarding its extant equipment, although no more, perhaps, than the "exaggeration" or "puffing" that TWL asserts is the "worst" that might be said of its conduct,[63] does, however, reinforce the generic conclusion that TWL has not demonstrated its basic financial qualifications. Its shifting representations illustrate graphically that TWL did (and does) not know what of its used equipment is operable, what is missing, or what acquisitions were (are) necessary to create a fully functioning VHF television station out of untested, cast-off equipage and a derelict transmission system.[64] Thus, while no penalty is charged under the "misstatement issue," the ALJ's examination thereunder was collaterally useful in bringing to light facts which illuminate the underlying matter of TWL's basic qualifications. While TWL might have possessed a vain and unsupportable "belief" that it had the resources necessary for broadcasting, it has actually shown not much more than that mere belief.

24. *Equipment Inspection.* Because TWL's efforts to comply with the ALJ's "inspection order were grudging and so insufficient that the purpose of the inspection was to a considerable extent thwarted," *I.D.*, Conclusions, para. 15,[65] the ALJ assessed TWL a "serious comparative demerit." *Id.*, at para. 18.[66] Although wholly agreeing

[63] TWL Reply at 4.

[64] *Houma Broadcasters, Inc.* ("HBI"), a party-intervenor who has settled out of this case, *I.D.*, para. 1 & n.2, has filed "limited exceptions" and urges, *inter alia*, that the ALJ erred in not adding a misrepresentation issue based on TWL's listing of the ownership of a "production van" on its application balance sheet; it contends that California records show that the van is registered to KQED, Inc., San Francisco. HBI Br. at 7–8. Without going into great detail, we affirm the ALJ. TWL's financial status and its misplaced reliance on dubious equipment is already sufficiently clear without pursuing the incidental question of the locus of seisin in a used truck. HBI's other exceptions are likewise rejected as duplicative or non-decisional.

[65] It will be recalled that the alleged equipment "on hand" was, in substantial part, stored haphazardly and inaccessibly in a trailer and that TWL's representative was instructed only to unlock the doors. *See* paras. 4–5, *supra*; *see also I.D.*, paras. 37–39.

[66] The comparative demerit was also apparently based, in undefined proportion, on the so-called "settlement agreement" aspect of the abuse of process issues. *See I.D.*, Conclusions, paras. 16–18. Because we hereinbelow reverse the ALJ's assessment of the demerit, we need not delve into the legal sufficiency of assessing a demerit without a more specific identification of the conduct elements warranting a particular penalty. *Cf. Leflore Broadcasting Co., Inc.* v. *FCC*, 636 F.2d 454, 463 (D.C. Cir. 1980) ("Where several violations are found, the Commission should set forth the role each plays in the assessment of a penalty. Rarely should the agency be permitted to take a 'gestalt' approach, one based upon a reaction to the 'overall' situation rather than to each violation one at a time.")

with the ALJ's characterization of TWL's conduct, we believe that the levy of a penalty based, in any degree, on that conduct partakes too strongly of the application of a retroactive standard. The conduct expected of this first-time applicant at the inspection was not articulated beforehand; nor are we aware of any published code that sets out such expectations. Before a penalty is assessed for misconduct, adequate prior notice of the appropriate standard of conduct should be redacted. *See, e.g., Straus Communications, Inc.* v. *FCC*, 530 F.2d 1001, 1011 (D.C. Cir. 1976); *Pressley* v. *FCC*, 437 F.2d 716, 721 n.5 (D.C. Cir. 1970). Should an "inspection" order be issued in a future case, the party against whom the order is directed should be apprised in relatively definitive terms as to its role. At a minimum here, TWL could have been reordered to submit to a second inspection more conducive to eliciting the objective condition of the equipment. In any event, the situation is largely selfcorrecting in that a party under the onus of a reasonable inspection order that does no more than did TWL runs the ineluctable risk that it will default on its showing, fail its procedural burden, and face disqualification. That scenario is at least as sharp a deterrent to "grudging" inspection conduct as a comparative demerit under the mantle of abuse.

25. *Settlement Agreement.* For reasons relating, in part, to the retroactivity factor discussed *supra* under the "inspection" issue, we will likewise erase whatever proportion of the "serious comparative demerit" the ALJ found attributable to TWL's withdrawal from a general settlement agreement announced by (prior) counsel. *See I.D.*, paras. 40–43; Conclusions, paras. 16–18. In synopsis, TWL president John Graves testified that he had instructed counsel on June 16, 1981 to settle the case because his wife was ill and he had tired of pursuing the application. *I.D.*, para. 41. Counsel advised the ALJ that the case had been settled, and the parties as well as the ALJ believed the case to be over on that day. *Id.* The ALJ dismissed the witnesses (who had travelled considerable distances) and continued the proceeding solely for the receipt of the final settlement agreement. *See I.D.*, Conclusions, paras. 16, 18. Unbeknownst to the ALJ, Graves later refused to sign the agreement papers forwarded to him by counsel and commenced to haggle on his own for substantially more money. *I.D.*, para. 42. TWL failed to respond to the settlement agreement filing deadline established on August 27, 1981 and later advised the ALJ—for the first time—that it intended to pursue its application. *Id.*, para. 43. The hearing was then recommenced.

26. TWL explains its conduct by saying that after Graves had telephonically agreed to the settlement, he later felt that it actually differed from the one TWL counsel had described on the telephone. TWL states that Graves "prayed" about what to do because he felt that he was "gambling" that the GACO application would be

granted, without which grant TWL would receive no reimbursement under the agreement.[67] Despite TWL's curious juxtaposition of the sacred and profane, and despite the fact that the record seems clear that TWL had agreed on June 16, 1981 to the original settlement amount (*i.e.*, $20,000, *see I.D.*, para. 41) and later reneged, thus greatly disrupting the adjudicatory process and causing wasted expenditures necessary to reassemble the hearing and the out-of-state witnesses, we find insufficient evidence that TWL's settlement conduct was intentionally aimed at abusing Commission processes.[68] Apart from the retroactivity considerations mentioned above, the Broadcast Bureau noted in its opposition to the addition of the "settlement" abuse issue that no written agreement had ever been filed.[69] And, while TWL's abandonment of its prior oral agreement was seriously disruptive, the Board has written that "[a]lthough the law does favor settlement, no Commission precedent prevents withdrawal of settlements. . . ." *Hanover Radio, Inc.*, 91 FCC 2d 849, 852 (Rev. Bd. 1982).

27. The Board is not insensitive to the fact that parties to an adjudicatory proceeding may attempt to use Commission processes as leverage in settlement negotiations. Nor are we immune to the fact that a request to an ALJ to cancel a scheduled hearing on the basis of a putative (or tentative) settlement involves the unpalatable risk of potential disruption if the settlement ultimately falls through. However, the law so favors settlements, *Country-Politan Broadcasting, Inc.*, 68 FCC 2d 640 (1978) (concurring statement of Chm'n Ferris), that we are reluctant to suggest a hearing procedure that goes so far towards reducing the risk of an abandoned settlement negotiation that we incur the equivalent risk that litigation might be pursued in lieu of careful and delicate settlement negotiations.[70] The best we can offer is that, when parties advise of a prospective settlement, the ALJ should seek a written confirmation of the basic settlement terms as early as possible and that the parties be monitored continually to determine the status of negotiations. Finally, should substantial extrinsic evidence surface to reveal that a party has disingenuously announced a settlement agreement for purposes of obstructing a hearing or for extracting better terms from a competing applicant who, necessarily, has been revealed as

[67] TWL Br. at 18.

[68] For an example of a "serious misuse of Commission procedures," *see Jimmie H. Howell*, 46 FCC 2d 1150, 1151 (Rev. Bd. 1974) (enlargement of issues), 65 FCC 2d 516 (Rev. Bd. 1977) (applicant disqualified).

[69] Broadcast Bureau Opposition to Petition to Enlarge Issues, filed October 20, 1981, at 3.

[70] The Review Board is itself familiar with the frustration attending the delay of abandoned settlements. *See, e.g., Absolutely Great Radio, Inc.*, 53 RR 2d 97, 100 n.6 (Rev. Bd. 1983) (proceeding held in abeyance for 49 days pending filing of announced settlement; settlement later abandoned).

amenable to settlement, that abusive party should be disqualified forthwith and absolutely.[71] No extrinsic evidence of such egregious conduct appearing in this case, TWL will not be penalized, notwithstanding its erratic conduct.

*Conclusion*

28. Over the past several years, the Commission has relaxed its financial qualification requirements to the point that applicants seeking to construct and operate a broadcasting facility may propose to do so on a veritable "shoestring."[72] Yet, the Commission has purposefully retained a substantive minimum to help ensure that those awarded a valuable broadcast construction permit first have the merest wherewithal to construct the station and to meet inaugural public interest obligations. *New Financial Qualifications Standards for Broadcast Television Applicants*, *supra* note 72; *Revision of Form 301*, *supra*. In the case at bar, TWL is not only bereft of the shoeleather necessary to ascend the relatively mild economic slope ahead, its "shoestring" is cleft through at virtually every eyelet. If anything, TWL's financial position is inferior to that of the applicant recently found unqualified in *United Broadcasting Co.*, *supra*; and, TWL's actions and representations surrounding its alleged equipment "on hand" reflect a lack of seriousness and an irresponsibility towards the licensee qualification process. Viewed in a less charitable light then we have cast, its actions in that latter regard flirt with fraud. As we have said, though, we will generally accept the ALJ's conclusion that there is not sufficient evidence of "deliberate falsification." *See I.D.*, Conclusions, para. 17.

29. This case does reaffirm, however, the Commission's foresight in maintaining a bare minimum financial requirement for broadcast applicants. *See Revision of Form 301*, *supra*, 50 RR 2d at 382. The people of Houma and Southeastern Louisiana deserve far better on one of the nation's few remaining full power VHF frequencies than, at best, a garage-shop electronics experiment (assuming, doubtfully, that TWL could ever actually transmit under the circumstances proposed) and a programming budget of $115 per day, augmented by

[71] In that connection, a party found to have abused processes in the described manner should not hope to escape with a mere "demerit." Abuse of process is a disqualifying offense. *Cf. Gulf Coast Communications, Inc.*, 81 FCC 2d 499, 513–515 (Rev. Bd. 1980), *application for review denied*, FCC 82–128 (released April 16, 1982) (mem.) *appeal docketed* No. 82–1760, D.C. Cir., 1982; *Home Service Broadcasting Corp.*, 24 FCC 2d 192 (Rev. Bd. 1970).

[72] *Compare Ultravision Broadcasting Co.*, 1 FCC 2d 544 (1965) (applicant must show ability to construct and operate for 1 year without advertising revenues) *with New Financial Qualifications Standards for Broadcast Television Applicants*, 72 FCC 2d 784 (1979) (reducing financial requirement for "start-up" period to 90 days' operating revenues plus construction costs) (PUBLIC NOTICE, released May 11, 1979). *Cf. Financial Qualifications Standards for Aural Broadcast Applicants*, 69 FCC 2d 407 (1978) (PUBLIC NOTICE, released August 2, 1978).

uncertain allusions to some "barter" programming. Although the Commission has pared its advance financial requirements to, perhaps, an irreducible minimum, that minimum must be met. *United Broadcasting Co., supra.* TWL has not come close. GACO, on the other hand, is fully qualified—a qualification TWL does not contest—and we affirm the ALJ's findings and conclusions with regard to GACO in every respect as well as the award of the permit.

30. ACCORDINGLY, IT IS ORDERED, That the Contingent Motion to Reopen the Record and to Enlarge Issues filed May 23, 1983 by GACO Communications Corp. and the Motion for Extension of Time filed June 6, 1983 by The Way of Life Television Network, Inc. ARE DISMISSED as moot; and

31. IT IS FURTHER ORDERED, That the application of GACO Communications Corporation (File No. BPCT-5047) IS GRANTED, and the application of The Way of Life Television Network, Inc. (File No. BPCT-790622KE) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 82D–74

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| GACO COMMUNICATIONS CORPORATION<br>Houma, Louisiana | BC Docket No. 80–484<br>File No. BPCT-5047 |
| THE WAY OF LIFE TELEVISION NETWORK, INC.<br>Houma, Louisiana | BC Docket No. 80–487<br>File No. BPCT-790622KE |
| For Construction Permit for a New Television Station. | |

Appearances

*Julian P. Freret, Christopher D. Imlay, James L. Oyster* and *Vincent A. Pepper*, on behalf of GACO Communications Corporation, *John H. Midlen, Jr.* and *Matthew H. McCormick*, on behalf of The Way of Life Television Network, Inc.; *Alfred C. Cordon, Jr.* and *Dennis J. Kelly*, on behalf of Houma Broadcasters, Inc.; and *Norman Goldstein*, on behalf of the Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

(Issued November 15, 1982; Released: November 23, 1982)

*Preliminary Statement*

1. By Memorandum Opinion and Order, FCC 80–534, released September 30, 1980, the Commission designated six mutually exclusive applications for hearing. All had applied for Channel 11 in Houma, Louisiana following the demise of station KHMA-TV, which had operated on the channel for a brief period in the early 1970's. During the course of the proceeding, three applications were dismissed and two applicants, Communications Corporation of the South, Inc. (CCSI) and GACO Communications Corporation, were merged into a single entity.[1] Thus at the commencement of the hearing on November 10, 1981, there were two surviving applicants, The Way of Life Television Network, Inc. (TWL) and the newly

[1] FCC 80M-2618, released December 12, 1980; FCC 81M-73, released January 12, 1981; and FCC 81M-2654, released August 27, 1981.

constituted GACO Communications Corporation (GACO). In addition a former applicant, Houma Broadcasters, Inc. (HBI), was granted intervenor status.[2] The issues in the case include the standard comparative issue and the following issues against TWL:

1. Whether the applicant will adopt and implement a policy of providing reasonable opportunities by representatives of religious faiths which do not share the religious beliefs of the applicant to express opposing or diverse religious views on the proposed Houma station;[3]

2. Whether operation of the proposed station from a main studio outside the city limits of Houma would be consistent with the public interest;[4]

3. Whether the applicant is financially qualified to construct and operate its proposed station;[5]

4. To determine whether TWL has, in pleadings filed during the course of this proceeding, misstated the condition of equipment it has purported to rely on in the construction and operation of its proposed station;[6]

5. To determine whether TWL failed to comply with an order of the presiding officer to permit entry, inspection and photographing of its equipment;[6]

6. To determine the facts and circumstances surrounding TWL's failure to comply with representations made to the presiding officer that its application would be dismissed in return for partial reimbursement of expenses;[6]

7. To determine, in light of the evidence adduced under the foregoing issues [4–6], whether TWL has abused the processes of the Commission and, if so, whether it possesses the requisite qualifications to be a Commission licensee.[7]

The designation order also specified a studio location issue against GACO. That issue was mooted by the GACO/CCSI merger, which provided that the merged applicant would utilize CCSI's proposed studio location.[8] The issue is therefore deleted.

2. Prehearing conferences were held on December 11, 1980 and February 10, 1981. An admissions session was held on June 15, 1981. On the following day, the parties represented that an agreement had been reached settling the case. The hearing was therefore continued

---

[2] See FCC 81M-3414, released October 30, 1981.

[3] Specified in the Memorandum Opinion and Order (FCC 80–534, released September 30, 1980) designating the case for hearing.

[4] The studio location issue specified in the designation order was modified by the presiding officer in an order (FCC 81M-466, released February 19, 1981); see also Memorandum Opinion and Order (FCC 81M-445, released February 17, 1981).

[5] Added by Memorandum Opinion and Order (FCC 81M-538, released February 25, 1981); see also Memorandum Opinion and Order (FCC 81M-445, released February 17, 1981 at n. 2).

[6] Added by Memorandum Opinion and Order (FCC 81M-3432, released October 30, 1981).

[7] Added by Memorandum Opinion and Order (FCC 81M-3432, released October 30, 1981). The burden of proceeding with the introduction of evidence on issue 4 was placed on GACO; the burden of proceeding with the introduction of evidence under issue 5 was placed on HBI; and the burdens of proof under all issues were placed on TWL.

[8] See FCC 81M-2654, released August 27, 1981, p. 2.

without date. However, as will be discussed *infra*, the settlement agreement was not consummated, necessitating a further conference on September 25, 1981 and hearings on November 10, 12, 13, 16 and 17, 1981. Proposed findings of fact and conclusions of law were filed on March 1, 1982 and replies thereto were filed on April 5, 1982.

## *Findings of Fact*

### *TWL's Religious Program Policy*

3. In its designation order, the Commission stated that TWL proposed to provide "predominantly religious programming," but had not expressed an intention to provide a "fair break" to others who do not share the same religious precepts as the applicant (para. 16). Accordingly, an issue was specified to determine whether TWL would provide a reasonable opportunity for the expression of "opposing or diverse religious views."

4. At the hearing, Janis Graves, TWL's vice president, explained that TWL in fact proposes a general market format, not a religious format as the designation order had suggested. Some religious programming will be broadcast. She stated that TWL will make time available to persons or organizations for the broadcast of religious views, precepts and/or tenets regardless of whether TWL or its directors agree with them. Time will be given on a "first come, first serve" basis. The board of directors will determine if free time is available. Further, TWL will not discriminate as to which persons or organizations are offered free time; and as to those who purchase time all will be charged the same rate for the same time, but the rate may vary depending upon the amount of time purchased and the time of day broadcasts are aired.

5. According to Mrs. Graves, TWL will make at least one hour per week available free to houses of worship located within its Grade B service contour. The hour may be divided into half hour segments. In any event, its use will be allocated on a rotating basis among the entities participating. If several churches are of the same denomination, the frequency of the invitations extended would be determined by the number of churches comprising the group. However, the size of the congregation would not be a factor in determining how often a church or organization would be offered free time (TWL Ex. 7, pp. 1–2).

6. Mrs. Graves testified that this policy would be made known as widely as possible through on-air announcements occurring at least once a week. Additionally, letters reflecting the policy would be sent to the Roman Catholic Diocese of Houma-Thibodaux and to the Ministerial Association which represents most other organized churches. Their assistance in disseminating the policy would be requested, and fringe religious groups would also be contacted. All houses of worship whose addresses appear in the yellow pages

telephone books of the various communities within the Grade B contour would also be sent letters outlining the station's policy. TWL hopes that as a result a variety of religious views would be expressed over the station.

*TWL's Main Studio Location*

7. TWL proposes to locate its studio on a tract of land approximately 210' x 210' abutting Federal Highway 90, which is one of the two main thoroughfares going into Houma. The site is approximately 1.25 miles from the city limits, 4–5 miles from downtown Houma and no more than 7–8 miles to the NE boundary of Houma. The proposed studio building is within several hundred feet of the site proposed by TWL for its transmitter tower and building (TWL Ex. 5, pp. 1–2; TWL Ex. 6; Tr. 344–46).

8. Although there is no public transportation, TWL represents that the proposed studio site is readily accessible to the residents of Houma and that parking facilities exist for 12–15 cars, with more room becoming available when certain equipment is removed from the area. In this connection TWL notes that since Houma has no mass transportation system, it would be necessary to use a privately-owned vehicle or taxicab to get to the studio no matter where it is located unless one lived within walking distance. According to Mrs. Graves, the availability of suitable property inside the city limits of Houma is small, if not nonexistent. Moreover, due to the rapid growth of the city's population and the upsurge of commercial building, acquiring any property comparable to this site within the city limits is not a reasonable alternative.

9. The 5,500 square foot building located on the proposed site was originally designed and constructed specifically for a television studio and served as the studio for station KHMA-TV during its short existence. The building is designed to accommodate future additions and the site affords space for expansion.

10. The proposed studio location is within a 10-minute drive of the center of Houma. It is on the major highway in the region and therefore the site will be accessible to residents of other communities within TWL's proposed service area, including Morgan City and Thibodaux. There are no barriers between the studio building and the city limits of Houma, such as canals or bridges. Finally, the proximity of the proposed studio building and transmitter to each other will provide for a more economical operation of the proposed station.

*TWL's Financial Qualifications*

11. TWL estimated that the cost of constructing and operating its proposed station for the first quarter would be $177,174. Of this total $105,360 would be dedicated to equipment and construction costs and $71,814 to first quarter operating costs (TWL Ex. 8, pp. 1–

2). In specifying the general financial issue against TWL, the presiding judge noted that substantial doubt existed regarding the applicant's financial ability to obtain use of the site it is proposing and to place the equipment located thereon in operational condition. There was also uncertainty as to how much additional equipment TWL would have to acquire and the terms under which its studio building would be obtained. See FCC 81M-445, released February 17, 1981.

12. *Construction and Equipment.* The estimated cost of construction and equipment was itemized as follows:

| | |
|---|---|
| Antenna System | $ 35,000 |
| RF Generating Equipment | On hand |
| Monitoring and Test Equipment | On hand |
| Program Originating Equipment | 14,200[9] |
| Remodeling of Buildings | 2,000 |
| Legal Costs | 30,000 |
| Engineering Costs | 500 |
| Installation | |
| (a) Studio Equipment | 7,000 |
| (b) Transmitter | 13,260 |
| Other Miscellaneous | 3,400 |
| TOTAL | $105,360 |

TWL's estimate is so low because, as indicated above, it already has equipment on hand. Additionally, the applicant proposes to rely on a deferred credit arrangement with Quality Media Corporation for $49,200 to cover the cost of any additional equipment it might be required to purchase (TWL Ex. 8, pp. 7–8, Attachment B). Many aspects of its proposal, however, were seriously challenged at the hearing.

13. Regarding the antenna system, TWL now estimates that it will cost $35,000 to make it operable.[10] This estimate includes the cost of replacing transmission line, refurbishing the antenna, and dismounting and remounting equipment on the existing tower. The price quotation was obtained from Quality Media, which would act as general contractor for the project and carry the entire $35,000 on a deferred payment basis (TWL Ex. 8, pp. 1–2, Attachment B, pp. 2–3; Tr. 537). Its president, William J. Kitchen, visited the tower site in 1977 and testified that absent any significant stress in the interim the tower should remain serviceable for many years (Tr. 547–51). He stated that his firm had experience in replacing transmission lines and would have no difficulty in acquiring the services of a subcon-

[9] This is in addition to the equipment on hand.

[10] Previously, TWL indicated that its atenna system, initially used by station KHMA-TV, would require no outlay for renovation and that it had on hand all required equipment for program origination. The revised estimate was prompted by allegations and supporting data by other parties to the effect that the antenna system was not operable (TWL Ex. 8, pp. 1–2).

tractor to work on the antenna (Tr. 554). However, he admitted that he did not contract any local contractors regarding their costs to correct the transmission or antenna systems (Tr. 586).

14. GACO witness Richard L. Biby, a consulting engineer, expressed a contrary view, estimating that the cost at present prices (i.e., December 1980) of putting TWL's proposed tower and antenna site into acceptable condition would be in excess of $100,000. Biby's estimate was based upon his analysis of on-site investigations conducted in 1976 by R. C. Cornforth of Cornforth Associates, whose firm specializes in structural analysis of towers, and by Dean W. Sargent of D. W. Sargent Broadcast Service, who inspected the tower site from the standpoint of radiating capabilities. There has been no maintenance in the interim, a fact which in Biby's view would have resulted in further deterioration from high winds and the semi-salt water near the site (GACO Ex. 12). Biby also stated that in addition to the minimum rehabilitation costs of $100,000 for the tower and antenna, additional expenses in excess of $25,000 would probably be required to replace coaxial cable connecting the studio to the transmitter (GACO Ex. 12, p. 5).

15. Turning to equipment, TWL relies essentially on used equipment it has acquired over the years; it has also earmarked $14,200 for various additional items that might be needed and $3,400 for miscellaneous technical parts and supplies (TWL Ex. 8, pp. 1–2, Attachment A). The $14,200 estimate for required additional equipment was furnished by William Kitchen who testified that, based upon his personal experience, these items could be acquired on the used market for that amount. Kitchen had previously assisted TWL in the acquisition of its other used equipment which he represented was in working order at the time it was sold to TWL (TWL Ex. 8, Attachment B, pp. 1–2). To the extent that additional equipment was needed, he said his firm would carry it on deferred payments for six months (Tr. 544).

16. Kitchen's assertion that the equipment was in working order at time of sale was based either upon personal inspection or reports of his staff. However, his representations as to the workability of the equipment related to the individual components since he had never assembled the entire system to see if it actually would function together (Tr. 588). The equipment had been gradually acquired by TWL since 1977 and had been stored in Monroe, Louisiana until recently when it was moved to Houma and housed in a trailer. Although Kitchen had observed the manner in which the equipment was stored when it was in Monroe, he was not aware of storage conditions once it was brought to Houma. Furthermore, he was reluctant to commit himself to guaranteeing that the equipment would be operable. He stated, however, that he would remedy any problems or replace any equipment that was defective at the time he furnished it to TWL (Tr. 589–90).

17. Robert D. Blazier, coordinator of instructional television at Nicholls State University, testified that on May 20, 1981 he examined TWL's inventory of equipment. He indicated to TWL that certain additional equipment would be required and TWL provided funds in its budget to cover the cost of the items he had suggested. In his written testimony, Blazier stated that he "found the [TWL] equipment usable for television broadcasting program origination" (TWL Ex. 8, p. 1, Attachment B, pp. 1–2, Attachment C, p. 1). On cross-examination, he explained that by referring to the TWL equipment on hand as "usable," he meant that it was equipment of a type that he had experience with and that it "looked to be in good shape" (Tr. 308–09). He also admitted that he did not inspect the transmitter, other than to look at it. His inspection of the studio equipment consisted of trying to take down the serial numbers to make sure all the equipment purportedly available was in fact available. He made no qualitative analysis of the equipment. He relied upon representations that the equipment was operational when purchased and did not plug any of it in to test for electrical performance. He claimed it would be unrealistic to check out each piece of equipment, but acknowledged that each piece would have to be checked before being assembled and that he could not tell from visual inspection if the equipment would work. According to Blazier, the equipment was 15–16 years old, had not been used for 10–11 years and was of tube, not solid state, variety. He testified that tube type equipment requires more maintenance than solid state and is more likely to deteriorate from lack of use (Tr. 296–300, 307–09).

18. Pursuant to an order from the presiding officer (FCC 81M-1342, released May 4, 1981), representatives of GACO and two other applicants who were then parties to the case conducted an inspection of the equipment in Houma during June 1981. The equipment was contained in a tractor trailer, adjacent to the KHMA studio site, and at a warehouse (Tr. 328). Photographs of the equipment reveal that it was strewn about or stacked randomly in facilities that were not thermostatically controlled (Tr. 308, see GACO Exs. 11A-Q; Tr. 829–63).

19. William B. Carr, a registered professional engineer, was among those who conducted the inspection. Based on first-hand observation, which was as detailed as possible under the circumstances, he concluded that there is not enough equipment in TWL's possession to construct and operate its proposed station. He also stated that the equipment in the trailer was in extremely poor condition and was placed there in a haphazard manner. It was crammed into a small space and much of it appeared to be damaged. Based upon the conditions under which inspection took place and the appearance of the equipment, it was not possible to determine whether it was operational (GACO Ex. 11, pp. 1–3). He noted, in particular, that the transmitter appeared to be dirty, with meters

and other components apparently broken (Tr. 823–24). Prior to the inspection, Carr had been furnished with a copy of TWL's purported inventory of equipment, but could find no evidence of a diplexer, which was indispensable to the functioning of a station, and which cost in the neighborhood of $30,000 to $40,000. He also was unable to locate video monitoring equipment, projectors and other equipment (GACO Ex. 11, p. 3; Tr. 864).

20. Horace W. Gross, president of Frazier, Gross & Kadlec, Inc., radio and TV management consultants, reviewed TWL's proposed capital investment, and concluded that the equipment which TWL listed in its proposal is insufficient for the proposed operation. He specified certain items which were lacking and also noted an absence of spare parts which would be required for normal maintenance. He specifically noted the transmitter proposed by TWL would require modification to operate on Channel 11 (GACO Ex. 8, pp. 2–3). According to E. Noel Luddy, manager, consultant relations for RCA, the cost of new equipment necessary to convert the TWL proposed transmitter from Channel 10 to Channel 11 would exceed $90,000 (GACO Ex. 14).

21. With respect to studio and transmitter buildings, TWL, which proposes to use the facilities of the former licensee, budgeted $2,000 to cover any repairs or remodeling which might be required (TWL Ex. 8, p. 2). The studio facility is now owned by the Louisiana Compressor Maintenance Company and has been used since 1977 as a repair shop for compressors. According to Ronald Cannon, president of the company, a machine shop was installed in the building, but the basic structure has not been significantly altered. The company left everything in the studio portion of the building intact on the assumption that it would again be used as a TV studio. The walls, electrical system and lighting grid remain unchanged and, according to Cannon, the building still resembles a studio (Tr. 611–17, 644). From his perspective, the only thing needed to make the building functional as a studio is a general cleanup (Tr. 643). Cannon's testimony is essentially confirmed by Blazier, who stated that the studio facilities used previously by KHMA do not require significant remodeling since the physical plant was well designed and has not been altered significantly (TWL Ex. 8, Attachment C, pp. 1–2). To the extent that the air conditioning unit for the building is not working, Cannon testified that he can and will repair it at no cost to TWL (Tr. 636–40). Iddo Corkern, a principal of GACO who visited the proposed studio building in June 1981, testified that the building was filthy, and that a big six-eight foot high hole had been cut in the west wall of the building to put in a big exhaust fan (Tr. 916–17). William Carr testified that the studio building looked like a machine shop and required the addition of special circuit breakers which cost $2,000-$3,000 (Tr. 866–67).

22. Carr also testified that the condition of the transmitter

building was extremely poor, the door was ripped open, snakes and cattle had been in and out of the building and everything was in a state of disarray including the electrical system (Tr. 865). Corkern stated that as of June 1977, when he inspected the transmitter building, it was in a state of disrepair with doors open, wiring and circuit breakers cannibalized and no sign of a water supply for cooling purposes (Tr. 911–14).

23. TWL earmarked $7,000 for installation of studio equipment, based upon an estimate by Blazier, who said that the total cost to install and interconnect all master control and production control equipment should not exceed that amount (TWL Ex. 8, p. 2, Attachment C, p. 5). However, although Blazier described various pieces of equipment which he would use with respect to installation of the master control and production control equipment, he testified that he only verified the availability of the equipment specifically referred to in his affidavit. He admitted that he did not know whether some of the materials which he pre-supposed were "on hand" or being acquired were actually available (TWL Ex. 8, Attachment C, pp. 2–5; Tr. 301–07, 327–28).

24. TWL's estimate of $13,260 for transmitter installation was furnished by Bruce E. Singleton, who was formerly chief engineer of the station (WLCY-TV, Largo, Florida) where TWL's transmitter previously was used. Singleton installed the transmitter when it was new in 1965, and dismantled it for shipment to Houma in the spring of 1979 (TWL Ex. 8, p. 2, Attachment D). Singleton testified that the life expectancy of a transmitter is about 10–15 years before requiring an overhaul. The particular transmitter acquired by TWL had been completely overhauled about one year prior to its being taken out of service in 1977. Prior to dismantling the transmitter for shipment, Singleton had checked with the previous transmitter maintenance engineer, who said that it had operated satisfactorily (Tr. 660, 668–69). He was confident that he could install the transmitter in accordance with the provisions of his estimate which included time for partial proof of performance. His obligation did not include completion of the final proof of performance and final preparation of the required forms (Tr. 648–49, 651, 673–74). Singleton acknowledged that, as a tube type transmitter, the TWL transmitter would be subject to breakage if not properly handled. He also included some spare parts shipped with the transmitter (Tr. 657–58; TWL Ex. 8, Attachment A, pp. 8–9).

25. *Cost of Operation.* TWL's estimated costs of operating for a three-month period are broken down as follows (TWL Ex. 8, pp. 3–4):

| | | |
|---|---|---|
| Studio Rental (Five Months) | | $10,000 |
| Transmitter Site and Tower Rental (Five Months) | | 10,000 |
| | Subtotal: | $20,000 |
| Salaries | | |

| | | |
|---|---|---|
| General Manager | | $ 0 |
| Program Director | | 0 |
| Sales Director | | Commission only |
| Salesman | | Commission only |
| Chief Engineer | | 6,000 |
| Technical Operators (6 full time or equivalent) | | 11,600 |
| Interns (3 at 20 hours/week; 1 News and 2 production) | | 2,900 |
| News Director | | 3,000 |
| Secretary (20 hours/week) | | 965 |
| | Subtotal: | $24,465 |
| Programming | | |
| Film and Tape Programming | | $10,500 |
| Blank Tapes (initial stock and replacement) | | 1,000 |
| News Service | | 1,320 |
| Music License Fees | | 250 |
| | Subtotal: | $13,070 |
| Office Operations | | |
| Supplies (initial stock and replacement) | | $500 |
| Telephone | | 750 |
| Postage | | 300 |
| Freight | | 3,000 |
| Janitorial Service | | 450 |
| Insurance | | 600 |
| | Subtotal | $5,900 |
| Utilities | | |
| Studio Building | | $1,950 |
| Transmitter | | 6,429 |
| | Subtotal: | $8,379 |
| | Total: | $71,814 |

At the hearing a number of these estimates were disputed by the other parties, in particular the costs assigned to site rentals for the studio and transmitter, salaries and programming costs.

26. TWL estimated its studio rental at $2,000 per month based upon an agreement with Louisiana Compressor Maintenance Company (TWL Ex. 8, Attachment E). Ronald Cannon, its president, verified that the $2,000 was a correct and binding figure (Tr. 641). He indicated that this figure covers all costs of maintenance, his mortgage and insurance costs and still results in a profit of about $500 a month for his company (Tr. 625). Also, to the extent that TWL as the lessee of the property would have to absorb some of the costs of having the compressor company vacate the premises and relocate, he said no cash outlay would be required from TWL. Rather, the costs could be recouped through trades or advertising time (Tr. 642). TWL would be reasonable for the costs of utilities and estimated the cost at $1,950 (TWL Ex. 8, p. 4; Tr. 640).

27. TWL estimated its transmitter site and tower rental at $2,000 per month. TWL proposes the former KHMA site and tower now owned by The Vanderbilt Corporation. The basis for TWL's estimate is an analysis conducted on its behalf of the value of the land and the tower, the price paid for the land and tower and an evaluation of what would constitute a fair return to the property owner (TWL Ex. 8, p. 4). Seymour Smith, president and principal stockholder of The Vanderbilt Corporation,[11] testified that no one from TWL has made any inquiry as to the availability of the property. He further stated that The Vanderbilt Corporation would not lease the property to any of the other applicants but would be willing to sell it to TWL for $250,000 (CCSI Ex. 8; Tr. 965–66). The property was purchased about six years ago for $100,000 (Tr. 960).

28. The salary estimates were based on conversations with the general manager of KADN-TV in Lafayette, Louisiana. With the exception of the chief engineer and the news director, all employees will be paid minimum wage during the first three months of operation, and an additional twenty percent has been set aside to cover other payroll costs. John Graves and Janis Graves, general manager and program director, respectively, will receive no salary during the first three months (TWL Ex. 8, p. 5). John Graves testified that he has not received any salary over the past six months, and has been able to support his family from outside sources of funds. He stated that he will continue to be able to do so (Tr. 407, 744–45). TWL also proposes to rely upon student interns from Nicholls State University in Thibodaux, Louisiana. Robert Blazier, the coordinator of instructional television at the university, described the internship program at the university and testified that there would be no difficulty in finding student interns in the communications arts program who would be willing to work at the minimum wage level (TWL Ex. 8, p. 6, Attachment H, pp. 1–2).

29. For its program schedule TWL proposes to rely upon a substantial amount of so-called "barter" programming.[12] It also anticipates that the station will be paid to air religious programming provided by organizations such as the Christian Broadcasting Network and the PTL Television Network. In addition TWL has budgeted approximately $115 per day for other programming. TWL claims that a number of programs are available to small market stations at a cost of $25 per episode or less and many packages of

[11] The Vanderbilt Corporation is the parent of CCSI which, as a result of the merger between itself and GACO, is a 50% stockholder in GACO. See FCC 81M-2654, released August 27, 1981.

[12] Under a "barter" arrangement, as described by TWL, the station is provided programming free of charge in exchange for running the commercials contained in the program. Commercial positions are also available in the program for the station to sell to local advertisers.

motion pictures are available at a cost of $20 or less per showing on small market stations (TWL Ex. 8, pp. 6–7).

30. Horace Gross, an expert witness and radio and TV management consultant, testified that Houma is not a separate ADI (Area of Dominant Influence) and is currently within the New Orleans ADI. Thus, the cost of programming would be substantially more than that proposed by TWL. Moreover, based upon applicable standards, Gross testified that TWL would not be able to establish Houma as a separate ADI. Moreover, any attempt to make the necessary showing would require at least a year's time.[13] Thus, for the first quarter of operation the station, in Gross' opinion, could not purchase programming at the budgeted figure (Tr. 800–05). According to Gross' analysis of TWL's programming proposal, the costs of acquiring the syndicated and feature film programming proposed by TWL would be at least three times as much as that proposed by TWL and probably more depending upon the actual mix (GACO Ex. 8, pp. 3–4).

31. Gross also pointed out that no provision was made for such basic and anticipated expenses as down payments and advance payments for film suppliers, materials and supplies to produce local programming such as film stock, slide materials, sets and flats, news gathering costs, advertising and promotion expenses, etc. Gross estimated that total operating costs for a station operating 117 hours a week without a network affiliation in a market such as Houma, with the type of operation proposed by TWL, would exceed TWL's estimate by at least $50,000 (GACO Ex. 8, pp. 4–6). William Kitchen, who was largely responsible for the preparation of TWL's estimates for programming and operating expenses, admitted that if TWL were not able to establish Houma as a separate market, its programming costs would be prohibitive. He also admitted that he had no idea whether TWL would be able to establish Houma as a separate market (Tr. 606).

32. Finally, in addition to challenging TWL's cost estimates GACO maintains that even the small sum set forth in TWL's financial showing would not be available to the applicant. In order to meet its estimated construction and first quarter operating costs of $177,174, TWL proposes to rely upon funds on deposit in the amount of $130,000 and deferred credit from its equipment supplier, Quality Media, in the amount of $49,200. The $130,000 is in the form of certificates of deposit at Progressive Bank and Trust Co. Quality Media has also agreed to provide deferred credit for additional equipment which TWL may purchase. No interest will be charged during the six-month period following delivery and payments will not be due until six months after delivery of the equipment (TWL Ex.

[13] The determination is made by a rating service based upon the number of television households in the country, the number of diaries being kept there for rating purposes, and the audience market share achieved by the station.

8, pp. 7–8, Attachment B, p. 1; Tr. 543–44, 735). In a Hearing Designation Order, BC 000634, released April 30, 1981, a financial issue was specified against Quality Media, an applicant in that proceeding, since its balance sheet reflected net liquid assets of only $13,262. The issue was never resolved because Quality Media dismissed its application. William Kitchen, president of Quality Media, explained that the analysis in that designation order was based on an outdated balance sheet and that Quality Media's financial condition has improved appreciably, to the point where the company is now quite profitable. Kitchen also testified that his costs of acquiring the equipment which he furnishes to TWL are substantially less than he charges them, so that Quality Media is not bearing as much of a cost as it appears (Tr. 581–82, 595–98, 602).

*Abuse of Process Issues Against TWL*

33. The presiding officer specified three factual issues against TWL which raised the general question whether the applicant had abused the processes of the Commission (see FCC 81M-3432, released October 30, 1981). The issues were based on allegations that TWL had made misstatements regarding its equipment on hand (issue 4, *supra*); had failed to fully comply with an order issued during the discovery phase of the proceeding (issue 5, *supra*); and had failed to comply with representations made to the presiding officer relating to a settlement of the case (issue 6, *supra*).

34. *Equipment Misstatements.* In an amendment to its application filed December 31, 1979, TWL represented at page 2, Section III, FCC Form 301, that all of its antenna system, its RF generating equipment, its monitoring and test equipment and its program origination equipment were "on hand." It also indicated that the antenna and transmission lines are presently in place on the tower the applicant proposes to lease. Accordingly, no funds were provided for any of these items on the form (GACO Ex. 9, p. 3; Tr. 885).

35. Thereafter, in an affidavit filed December 1, 1980 (filed with TWL's opposition to a petition to enlarge issues), John A. Graves again averred that "[w]ith the exception of the transmission line and antenna, which are already mounted on the tower facility T.W.L. intends to lease, T.W.L. has on hand the necessary equipment to begin operation of a television station" (GACO Ex. 10, p. 3). It was not until TWL's exhibit exchange on June 8, 1981, which was accompanied by an amendment to its financial proposal, that TWL made the following acknowledgment (TWL Ex. 8, pp. 1–2):[14]

> Previously, TWL had been advised that with the exception of the transmission line and antenna already mounted on the tower TWL proposes to rent, all necessary equipment to build the proposed station was on hand. In preparing for

[14] The amendment was accepted in an order (FCC 81M-3412, released October 30, 1981).

> this hearing, TWL has learned that some additional equipment should be obtained. Based on materials filed with pleadings of other parties to this proceeding, TWL has determined that it can no longer presume that the transmission line and antenna mounted on the tower are in operable condition...

Later, TWL identified additional equipment which it had not previously provided for (TWL Ex. 8, pp. 1–3, Attachment B).

36. Evidence as to the existence and state of TWL's equipment "on hand" has been described in the discussion of TWL's financial qualifications, *supra*, and will also be referred to in connection with the inspection issue, *infra*. This material is incorporated herein by reference.

37. *Inspection Issue.* In an order (FCC 81M-1342, released May 4, 1981), the presiding officer granted a motion to permit inspection and photographing of equipment which was allegedly "on hand" for use by TWL in the construction and operation of its proposed station. GACO and HBI contend that TWL, in violation of this order, prevented them from conducting any meaningful inspection of the equipment.

38. The inspection took place on June 8, 1981. It was conducted primarily by William B. Carr, a registered engineer, who was accompanied by principals of GACO, CCSI and HBI (all of whom were then applicants) and their counsel. No TWL principal was present; however, Robert Blazier, who had assisted in the preparation of TWL's application, met the group and explained that he had been instructed to unlock the doors to a trailer and a warehouse where the equipment was stored.

39. The trailer contained a transmitter, other RF generating equipment and certain studio equipment. The interior of the trailer was dark and the equipment was stacked in a haphazard manner. Access to it was difficult or in some instances impossible since there was only one entrance and little or no room to move about inside the trailer. Blazier's instructions were simply to unlock the trailer (Tr. 294–95), and no attempt was made to unload it so that individual pieces of equipment could be examined (GACO Ex. 11). Carr inspected the equipment as best he could under the circumstances. He testified that it was in "extremely poor" condition, with "parts broken off, components damaged, tube sockets broken . . ." (Tr. 823). He was unable to obtain the serial number of the transmitter, but observed "evidence of broken meters, broken pieces, this type of thing" (Tr. 824). He testified that on the whole the equipment could not be fully inspected or inventoried under the conditions that existed (GACO Ex. 11). The equipment in the warehouse was more accessible, but on the basis of the entire inspection Carr concluded that there was not enough equipment to construct and operate a television station and that he could not tell whether the equipment he did observe would actually work (*id.*).

40. *The Settlement Agreement.* The hearing in this case began on June 15, 1981. On the following day the parties announced that they had reached an agreement settling the case. TWL and HBI were to dismiss their applications with GACO and CCSI being merged into a single entity which would become the sole applicant for the channel. The hearing was therefore continued without date. In due course, HBI, CCSI and GACO filed a joint motion for approval of the settlement agreement. The motion was granted, the HBI and CCSI applications were dismissed and the GACO application was amended to reflect the GACO/CCSI merger (FCC 81M-2654, released August 27, 1981). During this period TWL remained silent. The presiding officer therefore scheduled a conference at which time (September 25, 1981) TWL stated that the case could be settled only if GACO accepted a counter offer calling for a substantially greater payment to TWL, something GACO refused to do. In view of the disruption and delay created by TWL's conduct, an inquiry into the entire matter was conducted.

41. TWL president John Graves testified that on the morning of June 16, 1981 (the day testimony in the case was to commence) he instructed his counsel to dismiss TWL's application without regard for any reimbursement. He explained that his wife was ill and that he had become tired of pursuing the application. Counsel advised him to seek a settlement, whereby TWL would dismiss its application in return for reimbursement of certain of its expenses (TWL Ex. 9, p. 2; Tr. 467). This conversation took place on the telephone since Graves was still in Houma. Later that morning counsel informed him that a settlement agreement had been reached. Graves understood that under the agreement he would receive $3,000 when the agreement was approved and $17,000 if and when the merged GACO/CCSI application was granted. He agreed to the terms and testified that at this point he believed the case "was over" (TWL Ex. 9, p. 3; Tr. 471). So, too, did the presiding officer when later that day announcement of the agreement was made on the record (Tr. 228–30).

42. In mid-July Graves received a final version of the agreement for his signature and found that the $3,000 and $17,000 had been consolidated, with payment of the entire sum to be made upon a grant to the merged applicant.[15] Graves testified that he feared he would receive nothing, since there was no assurance the merged applicant would be granted, there being an outstanding issue against one of the parties to the merger (TWL Ex. 9, p. 4).[16] For this reason,

[15] This document had been approved by Graves' counsel, who requested that Graves sign it.

[16] A cross-interest issue had been designated against CCSI (FCC 81M-467, released February 19, 1981). This was later resolved by summary decision (FCC 81M-2653, released August 27, 1981).

according to his testimony, he refused to sign the agreement. However, in late July Graves contacted Seymour Smith, a CCSI principal, regarding the settlement terms (TWL Ex. 9, pp. 4–5). According to Smith, Graves advised him that he had received a bill for $25,000 from his attorneys which was $5,000 more than he would receive under the settlement agreement (Tr. 954). He also told Smith he could not understand why he was getting $20,000 while HBI was getting $75,000 (Tr. 954). Graves then told Smith he thought he was to get $20,000 in addition to his expenses (Tr. 955). The problem, as Graves related it to Smith, was not the terms of payment but rather that the total figure of $20,000 was inadequate (Tr. 955–56). Smith testified that CCSI has at all times been willing to pay the agreed upon $20,000; but this was apparently no longer agreeable to Graves, even though his stated fear that the merged applicant would not be granted was largely obviated in August, when the issue which he said had concerned him was favorably resolved through summary decision (see n. 16, *supra* ).

43. During this period TWL never advised the presiding officer that it did not intend to live up to the settlement agreement announced on June 16, and that the representations regarding the voluntary dismissal of its application would be ignored. In an order released August 27, 1981 (FCC 81M-2654, n. 2), a deadline for the filing of settlement papers was set, and when no response was made by TWL a conference was held at which TWL finally indicated its intention to pursue the application.

*Comparative Issue*

44. *GACO.* The applicant has the following corporate structure:

| | |
|---|---|
| Communications Corporation of the South, Inc. (CCSI) | 1,000 shares (50%) |
| Seymour Smith | Director, voting the shares of CCSI |
| Douglas W. Black | Director |
| Iddo K. Corkern | President, Director, 490 shares (24.5%) |
| James A. Gatewood | Vice President, Director, 500 shares (25%) |
| Marion W. Corkern | Secretary, Treasurer, 10 shares (0.5%) |

45. CCSI has the following corporate structure:

| | |
|---|---|
| The Vanderbilt corporation | 10,000 shares (100%) |
| Seymour Smith | President, Director, votes the shares of The Vanderbilt Corporation |
| Florence Anne Smith | Director |
| David J. Smith | Vice President, Assistant Secretary, Director |
| Barbara (Smith) Hirst | Director |

| | |
|---|---|
| Douglas W. Black | Executive Vice President, Secretary, Treasurer |

46. The Vanderbilt Corporation has the following corporate structure:

| | |
|---|---|
| Seymour Smith | President, Director, 22,700 shares (74.4%) |
| Seymour Smith, Trustee of the David Smith Trust | 3,000 shares (9.8%) |
| Seymour Smith, Trustee of the Barbara Smith Trust | 3,000 shares (9.8%) |
| Florence Anne Smith | Director, 1,800 shares (5.9%) |
| David J. Smith | Vice President, Assistant Secretary, Director |
| Barbara (Smith) Hirst | Director |
| Douglas W. Black | Executive Vice President, Secretary, Treasurer |

47. Seymour Smith and Florence Anne Smith are husband and wife. David Smith and Barbara (Smith) Hirst are their children. Smith distributed the ownership to his family as shown for estate purposes. Iddo K. Corkern and Marion W. Corkern are husband and wife. James A. Gatewood is the nephew of Iddo K. Corkern.

48. CCSI owns 80% of the stock of Radio Vanderbilt, Inc., licensee of WWIW, a 1 kW-D, 250 W-N station in New Orleans, Louisiana. James A. Gatewood owns 98% of the stock of GACO Broadcasting Corporation, licensee of WFCG, Franklinton, Louisiana, a 1 kW-D station.[17] GACO and its principals have no other ownership interests in media of mass communication.

49. Iddo K. Corkern will serve as technical director of the proposed station on a full-time basis devoting at least 40 hours per week to station operations. James A. Gatewood will serve as sales manager of the proposed station on a full-time basis devoting at least 40 hours per week to station operations. Seymour Smith will serve as general manager of the proposed station on a full-time basis devoting at least 40 hours per week to station operations. As indicated in the above tables, Corkern is a 24.5% shareholder in GACO; Gatewood owns 25%; and Smith, who controls The Vanderbilt Corporation, will vote the 50% interest in GACO which is held by Vanderbilt's subsidiary, CCSI.

50. None of these individuals is a resident of the Houma area. However, they have extensive broadcast experience. Seymour Smith served as principal owner, president and full-time general manager of WGNO-TV, Channel 26, New Orleans, Louisiana, from 1972 to August 21, 1978. Since then he has been president of the licensee of

[17] New Orleans is about 50 miles from Houma, Franklinton about 97.

WWIW. Iddo K. Corkern served for 25 years as assistant chief engineer and later as chief engineer at WBRZ-TV, Baton Rouge, Louisiana. From 1967–1980 he was also an officer, director and principal of standard broadcast station WFCG, Franklinton, Louisiana. He was involved in part-time sales, on-air work and news reporting at the station. James A. Gatewood became program director of WHXY (now WBOX) in Bogalusa, Louisiana in 1953. In 1955 he joined the engineering department of WBRZ-TV in Baton Rouge where he worked until 1966 in engineering and sales. In 1966 he and Corkern formed GACO Broadcasting Corporation and constructed standard broadcast station WFCG, Franklinton. He is president, general manager and principal owner of the station. He also serves as sales manager and chief engineer.

51. *TWL.* Formed in 1977, TWL is a nonprofit, nonstock corporation organized under the laws of Louisiana. From the time its application was filed in June 1979, TWL's board of directors has consisted of John Arthur Graves, Janis Armstrong Graves and Purvis Glen Nash. Graves is president, Mrs. Graves is vice president and Nash is secretary-treasurer of the corporation. All three propose to work at TWL's station on a full-time basis, Graves as general manager, Mrs. Graves as program director and Nash as sales and news director.

52. Nash's commitment to the station is somewhat conditional. He presently operates a pharmacy in Jonesboro, Louisiana. If TWL is awarded the construction permit, he intends either to sell the pharmacy or hire a pharmacist-manager to replace him. If neither of these can be accomplished, a situation he does not anticipate, Nash will reduce his full-time commitment to the station, but in no event would he work there less than 20 hours per week (TWL Ex. 4, p. 2; Tr. 682).

53. In 1973 Graves and his wife formed and began operation of an independent nondenominational worship center and evangelistic outreach association in Monroe, Louisiana. The association grew to include a state-licensed day care center and a youth rehabilitation house. In 1976 the association was incorporated as Evangel Temple of Monroe, Inc. Graves served as president, a position he still occupies although the corporation is presently inactive. He resigned as pastor-general manager of Evangel Temple in the summer of 1980 and moved to Houma. As time permits, he continues to hold meetings and serve as a guest lecturer in various places.

54. In addition to extensive involvement with TWL, Mrs. Graves has taken two broadcast courses at Nicholls State University, "Television Production" and "Television Broadcasting Workshop." Additionally, in the fall of 1976 she co-hosted a daily radio talk show aired on station KJOE-FM, Shreveport, Louisiana. In the early 1970's she made appearances as a vocal artist on station KNOE-TV,

Monroe, Louisiana. She has also made numerous appearances on radio programs as a vocal artist and guest speaker.

55. Purvis Glen Nash is a registered pharmacist who in 1975 became the owner of a pharmacy in Jonesboro where he now resides. He intends to move to Houma if TWL's application is granted.

*Ultimate Findings and Conclusions*

*Issue 1 - TWL's Religious Program Policy*

1. TWL proposes a generalized program format which, among other things, will include religious broadcasts. TWL has represented that it would make time available to religious groups which sought it and would give no preference to any group in offering free time or in rates charged for paid time. TWL plans to air one hour of religious programming on Sunday for which no charge would be made. The time would be allocated on a rotating basis among all churches in the area which wish to use the station. There is no persuasive evidence that these representations would not be carried out if TWL were to receive a grant. It is therefore concluded that the TWL proposal complies with Commission policy with respect to the presentation of religious broadcasts, i.e., that a "fair break" will be afforded to those who do not share the same religious precepts as the applicant. *Queen City Broadcasting, Inc.*, 69 F.C.C. 2d 1775, 1778 (1978); *KIRO, Inc.*, 58 F.C.C. 2d 86, 89 (1976); *K.C.O.D. Broadcasting Corp.*, 11 F.C.C. 2d 349 (Rev. Bd. 1968).

*Issue 2 - TWL's Studio Location*

2. Section 73.613 requires a television station to maintain a main studio within its community of license, absent Commission permission to locate elsewhere. The rule "is intended as one means of assuring that the needs and interests of the residents of [the] community [of license] are met and that the station serves as an outlet for local self-expression." *Arizona Communications Corp.*, 25 F.C.C. 2d 837, 839 (1970), *recon. denied* 27 F.C.C. 2d 283 (1971). The Commission has stated that "the main studio rules . . . are intended to make broadcast stations readily accessible to the people in the communities which they are primarily licensed to serve . . . ." *FM-TV Main Studio Moves*, 27 F.C.C. 2d 851, 852 (1971).

3. TWL proposes to locate its studio on a main highway little more than a mile outside the city limits of Houma and four or five miles from the downtown area. The building itself was formerly used by KHMA-TV during its brief period of operation in the early 1970's. Driving time from the downtown area is about 10 minutes and there is an ample parking area at the site. There is no mass transportation system in Houma so access to this or any other site would be by motor vehicle unless it were within walking distance. In the circumstances TWL has demonstrated that operation from its

proposed site would be consistent with the public interest. See *Jersey Cape Broadcasting Corp.*, 85 F.C.C. 2d 654, 661 (1981).

*Issue 3 - TWL's Financial Qualifications*

4. The findings demonstrate that TWL has available to it $179,200 to meet its costs of construction and first three months of operation. Its cash in the amount of $130,000 is on deposit, and its equipment supplier (Quality Media Corporation) stated that it would extend deferred credit to TWL in the amount of $49,200. This is sufficient to meet TWL's estimates for construction and operating costs. These estimates, however, are based on a number of unwarranted assumptions and are consequently grossly understated.

5. First of all, the cost of obtaining the proposed transmitter site has not been included in TWL's estimate. It proposes to use the tower and transmitter site formerly used by station KHMA-TV and has budgeted $2,000 per month for rent. TWL has never discussed this arrangement with the owner of the land, The Vanderbilt Corporation, and the president of the corporation stated that the property would not be rented except to GACO, an applicant in which Vanderbilt holds an interest. If that application is denied, the site would be made available to TWL but only through a purchase of the property. A sale price of $250,000 was mentioned, but TWL has not demonstrated capability to meet even the $100,000 which the present owner paid for the site some years ago. Nor has TWL made any contingent showing as to its ability to obtain another site. See *Belo Broadcasting Corp.*, 88 F.C.C. 2d 922, 927, n. 27 (1981).

6. TWL's allocated cost for film and tape programming is approximately $115 per day, a figure which apparently assumes Houma would be recognized as a separate market. The record convincingly establishes that Houma is within the New Orleans ADI, that it is unlikely that Houma will be recognized as a separate market, and that in any event this could not come about until the station had been on the air for a year or more. Without such status its program costs would be about three times the estimated figure and would in the words of TWL's own witness be prohibitive (Findings, paras. 30–31). Additionally, the findings demonstrate that TWL failed to make provision for such costs as advance payments for film suppliers, materials and supplies to produce local programming, news gathering costs, etc. An expert witness, Horace W. Gross, estimated that in view of understatements and omissions in TWL's program budget, its total operating costs for the first quarter would be about $50,000 more than had been allocated. The testimony on this matter is detailed and explicit and is in the presiding officer's judgment thoroughly persuasive.

7. The findings also demonstrate that TWL's estimate of $35,000 to make its proposed antenna system operable is also grossly inadequate. TWL relied for its estimate on an on-site visit in 1977 by

its equipment supplier, who initially indicated that the tower and antenna system were adequate without any additional expenditure of funds. Thereafter, based upon allegations made by other parties in this proceeding, TWL revised its estimate to $35,000. The expert testimony of Richard L. Biby, a consulting radio engineer, belies this estimate. Biby analyzed reports of on-site investigations by a firm which specializes in structural analysis of towers and by a firm which specializes in analyzing antenna radiating capability for television broadcast signals. Biby's analysis of the experts' reports was documented and indicated that the minimum rehabilitation costs to bring the tower and antenna up to insurance standards would be $100,000 at 1980 prices. Biby also noted that the reports on which his estimates were based were four years old and that no maintenance took place in the interim period. Thus, the degradation may even be greater than that reflected. The presiding officer found Biby's analysis more complete and convincing than the showing made by TWL in support of its estimate and therefore concludes that his estimate of $100,000 is a more accurate reflection of the true cost of making TWL's proposed antenna system operable.

8. TWL had the burden of demonstrating that it had sufficient equipment "on hand" or available to it within its estimated costs to construct and operate its proposed station. To meet its burden, TWL relied principally upon the testimony of William J. Kitchen, the president of its equipment supplier, and Robert D. Blazier, coordinator of instructional television at Nicholls State University. Kitchen testified that he had provided enough equipment to construct and operate a functional station. He also stated that the equipment which he provided was operable at the time he furnished it to TWL.[18] However, he admitted that he had not inspected the equipment since it was transported to Houma and stored in a trailer truck and warehouse. He also admitted that he never assembled the components of the system to see if they functioned together. Similarly, Blazier admitted that he had not inspected the equipment since it was transported (or at any prior time), but had merely observed some of it and relied upon representations that it was all available and operable or to be provided. He did not test any of the components and admitted that it would not be possible to tell from visual inspection that the equipment worked or that it would function when assembled together.

9. William B. Carr, a registered professional engineer, conducted an on-site inspection of TWL's equipment at the facilities where it

[18] Kitchen also testified that he would replace any equipment which was not in operating condition at the time it was provided to TWL. However, he did not extend that assurance to equipment which was damaged subsequent to its acquisition by TWL. In light of the manner of storage of the equipment, a substantial question is raised as to how much it will cost TWL to replace the equipment which was damaged in transit or storage.

was stored. He had an inventory list of all the equipment which TWL purportedly had available; and based on his investigation he concluded that much of the itemized equipment was not to be found. For example, he could not find evidence of a diplexer which costs between $30,000–$40,000 or video monitoring equipment. He also discovered that much of the equipment was in damaged condition although he could not determine whether or not the damage would impair its performance. His evaluation of the equipment proposed to be used by TWL was that it was inadequate to construct and operate the proposed station.

10. Horace W. Gross, an expert radio and TV management consultant, reviewed TWL's proposal. Based upon his analysis, he concluded that certain additional items would be needed in light of the age of the equipment. He also noted that the transmitter proposed by TWL had originally operated on Channel 10 and would require substantial modification to operate on Channel 11. The cost of new equipment to convert the transmitter was estimated at $90,000 by the equipment manufacturer.

11. Based on the foregoing, it is found that TWL failed to meet its burden of proving that it has sufficient equipment "on hand" or available to it to construct and operate the proposed station. In light of the testimony of Carr, who conducted an on-site inspection of TWL's equipment, and of Gross, who analyzed TWL's list of equipment purportedly available, it is clear that a substantial question still exists as to whether TWL has the equipment it needs and that in all likelihood significant expenditures will still be required in order to construct an operable facility.

12. To conclude, TWL had the burden of demonstrating that it was financially qualified to construct and operate its proposed station for three months. TWL demonstrated the availability of $179,200 to meet its estimated costs. However, whereas TWL estimated its costs at $177,174, the record demonstrates that the actual costs will far exceed the amount shown to be available to TWL. Though it is not possible to establish a precise figure, TWL's cost of tower and transmitter site acquisition is speculative and contrary to the evidence; its estimate for tower and antenna rehabilitation is grossly understated; it has not established the availability of sufficient equipment in operational condition; and it failed to allocate sufficient funds to carry out its programming proposal. Thus it is concluded that TWL failed to establish its financial qualifications to become a permittee and that its application must therefore be denied.

*Issues 4–7 - Abuse of the Commission's Processes*

13. At issue here is whether TWL abused the Commission's processes through misstatements regarding equipment it proposed to utilize to construct the proposed station; failure to comply with an

order that the equipment be made available for photographing and inspection; and failure to comply with representations made to the presiding officer with regard to settlement of the case. Reduced to their essentials, the facts are these.

14. Until one week prior to the commencement of the hearing on June 15, 1981, TWL consistently represented that it had the necessary equipment (i.e., antenna system, RF generating equipment, monitoring and test equipment, program origination equipment) "on hand" to construct and begin operation of the station. Possession of such equipment in proper condition was an essential element of TWL's case since its financial proposal would otherwise be woefully inadequate, as the other applicants had contended in pretrial motions to enlarge issues. It was only after an order had been issued permitting inspection of the equipment by the other parties that TWL conceded the validity of some of the allegations which had been made against it. And even then the shortcomings, both as to the existence and the condition of some of the equipment, were significantly understated. No explanation for this conduct has been offered by TWL, which continues to insist that its representations were essentially correct.

15. As to the inspection itself, TWL's efforts to comply with the order that the equipment be made available for photographing and inspection appear to have been minimal. TWL simply sent a representative to the two sites where the equipment was stored with instructions that he unlock the storage areas. As TWL surely knew, the bulk of the equipment, nearly filling a small darkened trailer which had limited access, could not be examined in a meaningful way without being removed from the storage area,[19] something for which TWL had made no provision. Its conduct in this matter cannot be condoned; its efforts to comply with the inspection order were grudging and so insufficient that the purpose of the inspection was to a considerable extent thwarted.

16. TWL's conduct with respect to the settlement agreement is also disquieting. While it is not uncommon for settlement negotiations to break down, the consequences in this case were particularly unfortunate. The hearing had commenced and witnesses, who had traveled a considerable distance, were in the hearing room prepared to testify. When it was announced that the applicants had "reached a settlement" (Tr. 228) and its terms (including the proposed dismissal of the TWL application) were described, it was agreed that the hearing should be continued. In the circumstances all parties were clearly obliged to proceed in good faith toward effectuating the settlement. TWL failed to do so. Graves' testimony that he rejected

[19] It appears in fact that TWL had at one point represented that all the equipment would be consolidated in a single location and displayed in a manner that would permit a thorough inspection (Tr. 871–72, 877).

the agreement because it provided for a lump sum payment rather than two separate payments is clearly an after the fact rationalization. He never sought to have the agreement modified to conform to his original understanding, but instead began dickering for more money than he had earlier authorized counsel to accept. Moreover, his alleged fear that he would receive nothing if the merged GACO/CCSI application were not granted was rendered baseless with the issuance of an order making clear that only the continued pendency of the TWL application stood in the way of a grant.[20] There is no rational explanation for Graves' conduct in this matter except that he wanted more money for dismissing his application than he had originally agreed to accept. In other circumstances, this behavior might be overlooked but here it served to frustrate the orderly conduct of the hearing. The trial of the case was seriously disrupted, and TWL's failure to advise the presiding officer in a timely fashion of its intentions created uncertainty and further delay. When the Commission accepts representations from parties to its proceedings, it expects that good faith efforts will be made to carry them out. Graves' arbitrary refusal to abide by his prior agreement does not meet this standard. Clearly more punctilious conduct is expected of applicants for a broadcast license.

17. Of the matters discussed above, the presiding officer is reluctant to draw an adverse conclusion regarding TWL's misstatements as to its on-hand equipment. Conceivably, it believed until the eve of the hearing that the equipment was adequate, earlier allegations to the contrary by the other parties notwithstanding. In any event there is no evidence of deliberate falsification.

18. The other matters are more serious. TWL's compliance with an order directing that its equipment be made available for inspection and photographing was at best halfhearted and effectively precluded a full examination of the equipment. The representation to the presiding officer, after the hearing had begun, that TWL would dismiss its application as part of a settlement agreement that would eliminate the need for further hearings and expedite service to the public, was not carried out. TWL's principal John Graves undermined the agreement by insisting on a larger monetary payment than he had originally agreed to accept. In both of these matters TWL demonstrated a cavalier disregard for the processes of the Commission which adversely affected the orderly conduct of the case. Though its behavior is perhaps not disqualifying, a serious comparative demerit is warranted.

*Comparative Issue*

19. In view of TWL's disqualification under the financial issue, the comparative issue will be only briefly addressed.

---

[20] See FCC 81M-2654, released August 27, 1981.

20. TWL is entitled to a preference under the ownership diversification criterion since none of the principals holds an interest in any medium of mass communication, whereas one of GACO's shareholders owns a controlling interest in a Class IV AM station in New Orleans and another owns a 1 kW daytime-only station in Franklinton, Louisiana. Both applicants propose to integrate their owners[21] into the day-to-day operation of the station on a full-time basis.[22] However, TWL's proposal is less than unconditional, since it depends on the ability of one of its three directors to sell an existing business or hire a replacement for himself as pharmacist-manager of the enterprise. If neither of these plans can be accomplished, his participation in station affairs would be on a part-time basis. In view of this element of uncertainty the presiding officer has concluded that from a quantitative standpoint, GACO's proposal is to be preferred. Qualitatively GACO brings vastly more broadcast experience while TWL would provide local ownership, though none of its principals is a long-time resident of the area. TWL's proposal would also be enhanced by the presence of a female, Mrs. Graves, in station management. On balance, however, a preference will be accorded GACO because of the unequivocal nature of its representation that individuals holding a 99.5% interest would be integrated on a full-time basis, whereas some doubt exists as to whether TWL's full-time integration would be 100% or 66 $^{2}/_{3}$%. In the circumstances, the negative conclusions reached on two of the abuse of process issues against TWL assume particular significance. Though the comparative issue would otherwise be a close one, in view of the comparative demerits assessed for abuse of process the presiding officer concludes that if the decision were to be based on comparative grounds GACO has shown itself to be the better qualified applicant.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of The Way of Life Television Network, Inc. IS DENIED and the application of GACO Communications Corporation IS GRANTED subject to the condition[23] that prior to commencement of its operation on Channel 11 Seymour Smith and David

---

[21] TWL is a nonstock corporation. For purposes of this comparison its three directors will be equated with shareholders.

[22] GACO's integration is actually 99.5%. In arriving at this figure, the presiding officer has credited Seymour Smith with a 50% ownership interest. While his beneficial interest is somewhat less, he will vote the 50% interest held by The Vanderbilt Corporation.

[23] See FCC 81M-2653, released August 27, 1981.

Smith shall terminate their employment agreements with WGNO(TV), New Orleans, Louisiana.[24]

FEDERAL COMMUNICATIONS COMMISSION
JOHN H. CONLIN, *Administrative Law Judge*

[24] In the event exceptions are not filed *within 30 days after the release of this Initial Decision*, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Broadcast Experience
Diversification, of Control of Mass Media
Issue, Rule 1.65
Minority Ownership, Factors in Comparative Proceeding
Misrepresentation, Character Qualifications
Programming Proposal

Review Board Decision modified. Diversification and minority ownership entitled to less significance in an interim proceeding whereas broadcast experience has more significance than in a permanent licensing proceeding. Petition to add misrepresentation and proposed programming issues based on allegations that program plans have changed denied. Failure to report death of principal does not warrant Section 1.65 issue.
*–Global B/cing Group, Inc.*
BC Docket No. 82–531

FCC 83–321

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| GLOBAL BROADCASTING GROUP, INC. | BC Docket No. 82–531<br>File No. BPIH-820409AA |
| NEWARK RADIO BROADCASTERS ASSOCIATION | BC Docket No. 82–533<br>File No. BPIH-820429AJ |
| For Interim Authority to Operate the Facilities of Former Station WHBI(FM) Newark, New Jersey | |

MEMORANDUM OPINION AND ORDER

(Adopted: June 29, 1983; Released: July 8, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING IN THE RESULT; COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONERS DAWSON AND RIVERA DISSENTING.

1. Now before us are: (a) an application for review of a Review Board Decision (FCC 82R-66, released November 19, 1982), filed

December 17, 1982, and Notice of Appeal, filed November 29, 1982, by Newark Radio Broadcasters Association;[1] (b) a petition for special relief, filed February 28, 1983, by Global Broadcasting Group, Inc.;[2] (c) a motion to reopen the record and to enlarge issues, filed January 12, 1983, by Newark Radio Broadcasters Association;[3] and (d) a supplement to motion to reopen the record, filed February 7, 1983, by Newark Radio Broadcasters Association.[4]

2. *Motion to Enlarge Issues.* The Review Board refused to award any applicant in this proceeding a comparative preference for proposed programming because all of the applicants proposed to continue the multi-ethnic and multi-lingual format of former Station WHBI and no showing of substantial and material differences had been made. Relying on an interview with Global's vice president Raul Alarcon which was reported in *Billboard* magazine, Newark maintains that Global intends to adopt a Spanish language, rather than a multi-ethnic/multi-lingual, format. Newark submits that *George E. Cameron, Jr. Communications*, 71 FCC 2d 460, 465 (1979), requires the addition of a proposed programming issue to inquire into the relative need for the two formats. Since Global previously represented to the Commission[5] that it would follow the multi-lingual format, Newark also seeks the addition of a misrepresentation and/or lack of candor issue against Global.[6]

3. We will deny Newark's motion to enlarge issues. We find that Newark's allegations concerning Global's proposed programming are not supported by the requisite specificity to warrant the addition of an issue under Section 1.229 of the Commission's Rules.[7] The only

---

[1] Global Broadcasting Group, Inc. filed an opposition on January 3, 1983, and Newark Radio Broadcasters Association filed a reply on January 13, 1983.

[2] Newark Radio Broadcasters Association filed an opposition on March 7, 1983 and Global Broadcasting Group, Inc. filed a reply on March 21, 1983. In its petition Global sought permission to begin immediately operating the facilities of Station WHBI(FM). In view of our action herein we will dismiss the petition for special relief as moot.

[3] Global Broadcasting Group, Inc. filed an opposition on January 26, 1983 and Newark Radio Broadcasters Association filed a reply on February 2, 1983.

[4] Global Broadcasting Group, Inc. filed an opposition on February 24, 1983, and Newark Radio Broadcasters Association filed a reply on March 3, 1983.

[5] Global's application, a comparative showing filed with the Board, and oral argument before the Board indicate that Global would maintain the multi-lingual format.

[6] Newark relies upon *Fox River Broadcasting Inc.*, 88 FCC 2d 1132, 1136 (Rev. Bd. 1982)

[7] Section 1.229 of our rules specifies: "Such motions, oppositions thereto, and replies to oppositions shall contain specific allegations of fact sufficient to support the action requested. Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge thereof."

support for Newark's allegations is a magazine article which is clearly hearsay.[8] Moreover, the only statement attributed to Global principal Raul Alarcon in the article simply indicates that Global will honor the station's program commitments, and thus does not contradict Global's previous representations to the Commission. In its opposition, Global denies that it intends to change its proposed programming format. Subsequent affidavits from Raul Alarcon, Jr., Emil Antonoff, and Guy LeBow confirm that Global intends to maintain the current multi-lingual/multi-ethnic format of Station WHBI(FM).[9] As Global asserts, a greater emphasis on hispanic programming is not inherently inconsistent with the proposed multi-lingual format.[10] In view of Global's uncontroverted assurance that its program plans have not changed, further inquiry into this matter would serve no useful purpose.

4. *Supplemental Motion to Enlarge Issues.* Newark also seeks a Section 1.65 issue against Global for its failure to report the December 26, 1982 death of Global principal Juan Cossio.

5. We will not add a Section 1.65 against Global. Section 1.65 of the Commission's Rules requires applicants to timely report any change in the information furnished on their applications. Thus, Global has technically violated Section 1.65 by not reporting the death of Juan Cossio.[11] However, a Section 1.65 issue is not warranted since the unreported change could have no bearing on Global's basic and/or comparative qualifications. There does not appear to have been any intent to conceal this information from the Commission and no pattern of reporting violations has been established.[12] [13]

---

[8] *LeFlore Broadcasting Co.*, 48 FCC 2d 1199, 1200 (Rev. Bd 1974).

[9] The affidavits were executed on February 18, 1983, February 9, 1983, and February 18, 1983, respectively, and were attached to Global's February 28, 1983, Petition for Special Relief.

[10] Attached to Global's Opposition is an affidavit from the reporter who wrote the article in *Billboard*. It states that the reporter has no reason to believe, and did not intend to indicate, that Global is not committed to the proposed multi-lingual format.

[11] Juan Cossio was a 15% owner of Alarcon Hernandez & Cossio Assoc., and became a nonvoting shareholder of Global when the parties merged. By the terms of the merger agreement Cossio received one share of stock in exchange for services to be rendered. *See* Joint Request for Approval of Agreement, filed October 12, 1982, by Global Broadcasting Group, Balkan Echo, and Alarcon, Hernandez & Cossio Assoc.

[12] *Gainesville Media, Inc.*, 59 FCC 2d 382 (Rev. Bd. 1976); *United Broadcasting Co.*, 58 FCC 2d 1346, 1360–61 (Rev. Bd. 1976); *Post-Newsweek Stations*, 52 FCC 2d 572 (Rev. Bd. 1975); *Erwin O'Conner*, 51 FCC 2d 930 (Rev. Bd. 1975); *Western Connecticut Broadcasting Co.*, 47 FCC 2d 142 (Rev. Bd. 1974); *Lexington County Broadcasters Inc.*, 40 FCC 2d 694 (Rev. Bd. 1973).

[13] We will not, as Newark requests in its Reply, add a financial issue against Global. Newark has not submitted its request for an additional issue in the form of a motion to enlarge issues, and we do not entertain requests for new issues which are contained in responsive pleadings. *See* Section 1.44 of the Commission's Rules;

6. *Application for Review.* In a decision, released November 19, 1982, the Review Board found all three applicants fully qualified but preferred Global on comparative grounds. It awarded Global a slight preference on diversification[14] and concluded that Global and Newark were virtually equal on integration. In so concluding the Board found that Global's advantage for superior broadcast experience and local residence[15] balances out Newark's plus for minority participation.[16] Newark seeks review of the Board's determination that Newark and Global are virtually equal on integration. It maintains that the Board's Decision is inconsistent with our recent decision in *Waters Broadcasting Corp.*[17] and that its conclusion that Global is superior on local residence and broadcast experience is not supported by substantial evidence on the record.[18]

7. We substantially agree with the findings and conclusions of the Board, and they are affirmed except as they are modified herein. In determining that Global was superior to Newark on local residence and broadcast experience, the Board credited Global with 100% local residence and Newark with 60% local residence. It appears, however, that Oyster Bay Cove, the residence of Emil Antonoff,[19] is outside the service area of Station WHBI.[20] Thus,

---

*Milam & Lansman*, 4 RR 2d 463 (Rev. Bd. 1964). Furthermore, Juan Cossio received one share of nonvoting stock in Global in exchange for services to be rendered. Thus, his death raises no question as to the financial qualifications of Global and we will not add the issue on our own motion.

[14] One of Newark's five trustees, Joseph Bahr, is the sole proprietor of Station WVIS(FM), Frederiksted, St. Croix, Virgin Islands. Decision, para. 14.

[15] All three of Global's principals were found to have extensive broadcast experience whereas only one of Newark's principals has significant broadcast experience. Decision, para. 22. The Board found that three of the five Newark principals reside in the service area whereas all three of Global's principals live in the service area. Decision, para. 21.

[16] Newark is 60% minority controlled whereas Global is one-third minority owned. Decision paras. 15 and 17.

[17] 91 FCC 2d 1260 (1982).

[18] Newark also maintains that Global is financially unqualified because it failed to certify that it was financially qualified when it amended its application on October 22, 1982 to eliminate the participation of certain of Global's non-voting shareholders which had had financial responsibility for Global. However, Global's October 12, 1982 amendment which reported the formation of Global Broadcasting Group, Inc. certified that it was financially qualified. Global was not required to recertify this matter in the October 22 amendment changing the status of the corporation to nonprofit.

[19] It is alleged by Global that Antonoff has relocated to New York City, which is within the service area. We attach little weight to residence which is not of several years duration. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965). Furthermore, the two principals of Newark who presently do not reside in the service area propose to move to the city of Newark. Board Decision, para. 21.

[20] Global has submitted no documentation to support its contention that Oyster Bay Cove is within the service area. We take official notice of the most recent contour map contained in the Commission's engineering file for Station WHBI(FM). It is dated April 1979 and shows that Oyster Bay Cove is outside the station's 60 dbu (1

Global is entitled to only 66 2/3% local residence credit and the applicants are virtually equal on this factor. Nevertheless, we believe that Global is entitled to a clear preference on integration. All three of Global's principals have significant broadcast experience whereas only one of Newark's principals has had any prior broadcast experience.[21] Ordinarily we would attribute little significance to Global's advantage on this factor since broadcast experience confers only an initial advantage.[22] However, broadcast experience has added significance in an interim proceeding where an applicant seeks to take over an ongoing operation. In view of the limited duration of an interim operation, we find that an experienced broadcaster is at a decided advantage because it is difficult for interim operators to attract experienced, competent staff to run the station. Consequently, it is especially important that the interim operator have broadcast experience. Here the cumulative experience of Messrs. Alarcon, Antonoff and LeBow is superior to that of Newark's principals. Moreover, the broadcast experience of Global's three principals is more closely associated with the type of operation presently in place at Station WHBI(FM) and which both applicants propose to continue. Given the importance of broadcast experience where an interim operator is being selected, Global's advantage in this area outweighs Newark's advantage for minority ownership. Accordingly, we will award Global a clear preference on integration. Although we have applied standard comparative criteria in this proceeding, we cannot ignore the fact that we are determining which of the applicants becomes the interim operator of an already operating station. Under these circumstances the weight to be given to the various comparative factors varies from the ordinary situation involving applicants for permanent facilities.

8. In addition to a clear preference on integration, Global is entitled to a slight preference on diversification, as the Board found, because Newark principal Joseph Bahr is the sole proprietor of

---

mV/m) contour. *See Midwest Television, Inc.* v. *FCC*, 18 RR 2d 2001 (D.C. Cir. 1970); *International Radio, Inc.*, 1 RR 2d 701 (1963).

[21] The Review Board found that Guy LeRow has had more than thirty-five years experience in radio and television broadcasting, programming and management; that Emil Antonoff has been a broadcaster and producer of ethnic programming for approximately 20 years; and that Raul Alarcon is an experienced producer of hispanic oriented broadcasts. Newark claims that the findings with respect to Antonoff and Alarcon are not supported by substantial evidence because they are based on unverified pleadings and statements of counsel. We will adopt the Board's findings with respect to broadcast experience notwithstanding Newark's argument. Newark's purely procedural argument does not challenge the accuracy of these findings. Under the circumstances of this expedited proceeding, where there was not an evidentiary hearing before an Administrative Law Judge, it was appropriate for the Board to rely on uncontroverted statements made by counsel in written pleadings and during oral argument.

[22] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965).

Station WVIS in Frederiksted, St. Croix, Virgin Islands whereas Global has no other media interests. Since Global is entitled to a clear preference for integration and a slight preference for diversification, we find that the grant of Global's application would better serve the public interest.

9. ACCORDINGLY, IT IS ORDERED, That the Motion to Reopen the Record and to Enlarge Issues, filed January 12, 1983, by Newark Radio Broadcasters Association IS DENIED.

10. IT IS FURTHER ORDERED, That the Supplement to Motion to Reopen the Record and to Enlarge Issues, filed February 7, 1983, by Newark Radio Broadcasters Association IS DENIED.

11. IT IS FURTHER ORDERED, That the Application for Review, filed December 17, 1982, by Newark Radio Broadcasters Association IS DENIED, that the Decision of the Review Board (FCC 82R-66, released November 19, 1982) IS SET ASIDE; that the application of Global Broadcasting Group, Inc. IS GRANTED; that the application of Newark Radio Broadcasters Association IS DENIED; and that the Petition for Special Relief, filed February 28, 1983, by Global Broadcasting Group, Inc. IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Female Ownership-Participation, Compare Credit for
FM Station, Authorization
Minority Ownership, Factor in Comparative Hearing
Review by Review Board

Review Board affirms Initial Decision, 91 FCC 2d 1198, grant of FM station construction permit to one of two competing 100%-integrated applicants. Winner has substantial enhancement credit for 100% female ownership participation in management; loser's credit is insignificant because its integrated minority ownership is only 15%.
–*Horne Industries, Inc.*
BC Docket No. 81–551

FCC 83R–49

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| HORNE INDUSTRIES, INC.<br>Russellville, Arkansas | BC Docket No. 81–551<br>File No. BPH-11185 |
| RIVER VALLEY BROADCASTING, INC.<br>Russellville, Arkansas | BC Docket No. 81–552<br>File No. BPH-800711AJ |
| JUDY K. PURTLE<br>Russellville, Arkansas | BC Docket No. 81–553<br>File No. BPH-800807AE |
| For Construction Permit | |

*Appearances*

*Eugene T. Smith* on behalf of Horne Industries, Inc.; *Michael A. Pace* and *J. Dominic Monahan* on behalf of River Valley Broadcasting, Inc.; and *Kathryn R. Schmeltzer* and *Martin R. Leader* on behalf of Judy K. Purtle.

## Decision

(Adopted: July 8, 1983; Released: July 13, 1983)

Board Member Blumenthal for the Review Board:

### *Background*

1. This proceeding is back before the Board on remand from the Commission *en banc*. *Memorandum Opinion and Order*, FCC 83–208, released May 3, 1983 (hereinafter "*Remand Order*"). The Board, after reviewing the *Initial Decision* [1] and exceptions thereto, as well as hearing oral argument on the exceptions, certified the proceeding to the Commission on the question of the relative comparative enhancement due to 100% "integrated" applicants,[2] one of which had female ownership and one of which had minority (black) ownership. *Horne Industries, Inc.*, 91 FCC 2d 1193, 1196–97 (Rev. Bd. 1982)(hereinafter "*Certification Order*"). In its *Remand Order*, the Commission observed that "there are other issues which could have a bearing on the ultimate outcome of this proceeding" (*id.*, at para. 2),[3] and that "the Board's analysis of the [policy] questions in this proceeding is appropriate" (*id.*, at para. 3). To assist us in our analysis, we invited the parties to comment on the policy matters herein.[4]

2. In his decision, the ALJ compared all three applicants and found: (1) "Horne [Industries, Inc.] is out of it," *I.D.*, Conclusions, para. 3 (footnote omitted), that applicant already owning KARV-AM, Russellville, as well as having other media interests in the Southwest which rendered it a "clear loser" under the diversification criterion, *id.*,[5] and proposing no integration whatever, *id.*, para. 4; (2)

---

[1] FCC 82D-32, 91 FCC 2d 1198, (ALJ W. Miller)(hereinafter "*I.D.*").

[2] Integration, in the sense used here, is a term-of-art well-known to communications practitioners and denotes the level of active participation in station management by station owners. The higher the management integration level, the greater the credit within the comparative criterion of "best practicable service." *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395–96 (1965). *See also, e.g., Muncie Broadcasting Corp.*, 89 FCC 2d 123, 134 (applicant with 100% integration preferred over applicant with 39.86% integration), *recon. denied*, 89 FCC 2d 1331 (Rev. Bd. 1982), *review denied*, FCC 83–234, released May 19, 1983.

[3] The *Remand Order* specifically pointed to the finding of the ALJ that the minority principal of River Valley had been untruthful in his representations to the Commission. Our review of this finding is to be found *infra*, paras. 5–6.

[4] Letter of May 13, 1983 from Board Chairman Joseph A. Marino to counsel for the parties. The parties duly filed supplemental briefs and we, in turn, have duly considered them.

[5] "Diversification [of control of the mass media] is a factor of primary significance" in awarding broadcast licenses. *Policy Statement*, *supra* note 2, 1 FCC 2d at 394. A competing applicant which already owns a station in the community at issue is almost always at an insurmountable comparative disadvantage. *See, e.g., Thomas and Essie Collins*, FCC 83R-11, 53 RR 2d 219, 221 (Rev. Bd. 1983); *Hassayampa Broadcasting*, FCC 82R-70, 52 RR 2d 1059, 1061 (Rev. Bd. 1982), *review denied*, FCC 83–295, released June 28, 1983 (mem.).

River Valley deserves a "slight preference" for proposing auxiliary power, *id.*, para. 22, but that its 100% integration proposal was, in significant part, qualitatively inferior because a 15% principal had been "untruthful," had "less than a stable employment record," and had "dead-beat propensities," *id.*, para. 19;[6] and, (3) Judy K. Purtle, with a 100% integration credit enhanced by, *inter alia*, "nine solid years of quality broadcast experience . . . combined with her local residence, and her civic participation," *id.*, para. 23, was the

---

In its exceptions, Horne does not challenge its clear loss in this competition; it merely desires that the record be updated to reflect that its principal, Michael Horne, has sold his interests in "KIKZ, Seminole, Texas; KOYY(AM & FM), El Dorado, Kansas; and KWCK(AM) and KSER(FM), Searcy, Arkansas." Horne Exceptions at 2. Although recognizing that these interests were properly charged to Horne since their sale came after the deadline for comparative upgrading, *see, e.g., Alexander S. Klein, Jr.*, 87 FCC 2d 423, 427 (1981)(applicant charged with media interests owned at cut off date unless filing includes unqualified representation to divest), Horne would like the record to be "corrected" so that "Michael Horne should not be faced with the task of explaining to others that a government agency has released a document which states that he is a multi station owner rather than a single station owner." Horne Exceptions at 2.

Accordingly, and except for decisional purposes in this proceeding, *Klein, supra*, the "record" hereby reflects that Michael Horne owns whatever broadcast interests shown in current Commission files, official notice taken (*see* 5 U.S.C. § 556(e)).

[6] As noted at note 3, *supra*, the issue respecting the truthfulness of a River Valley principal, Almer Jackson (15%), is addressed textually *infra* at paras. 5–6. River Valley also excepts to the ALJ's "findings" anent Jackson's "employment record," River Valley Exceptions at 33–36, his degree of interest in the application, *id.*, at 37–39, and his credit-worthiness, *id.*, at 39–40.

With respect to these "findings," River Valley complains that the ALJ demonstrated an "unfortunate disdain for Jackson," *id.*, at 33, that the ALJ conducted an "unrelenting attack against Jackson," *id.*, at 37, and it even questions "the standards of fairness and impartiality which the ALJ used in weighing and evaluating the qualifications of River Valley," *id.*

Because of the vehemence of these complaints, the Board has reviewed minutely the record and the transcript in this proceeding. We find that, apart from the "truthfulness" aspect discussed *infra*, the ALJ's "findings" regarding Almer Jackson are exaggerated, gratuitous, and mostly irrelevant under the Commission's comparative standards; they will be disregarded by the Board for decisional purposes.

On the other hand, we observe in passing that River Valley's "exceptions" to these "findings" are almost equally exaggerated and—with their intemperate language—smack sharply of protesting "too much." For example, River Valley complains that the ALJ characterized Jackson as "shiftless, a deadbeat, unreliable and untrustworthy." River Valley Exceptions at 40. However, as Purtle accurately notes in its Reply (at 15–16), these derogatory terms (other than the ALJ's acceptance of Purtle's charge that Jackson has "dead-beat propensities," *see I.D.*, Conclusions, para. 19) are used exclusively by River Valley's own counsel. And, the ALJ also made some important positive findings about Jackson, *see I.D.*, Conclusions, paras. 16–17 (finding that Jackson will honor his $15,000 debt for his stock in the applicant and his pledge to integrate 40 hours per week).

preferred applicant. In the main, and in view of the more recent developments of law and policy relating to minority/female enhancement merits discussed *infra* at paras. 7–13, we affirm the ALJ's findings and conclusions, except as modified herein, as well as the award to Purtle.

## APPLICANT QUALIFICATIONS

3. River Valley fires a salvo at the ALJ's determination that Purtle is entitled to an enhancement of its integration credit for Judy Purtle's past broadcast background and her civic activities in Russellville;[7] it alleges, in fact, that Purtle misrepresented her alleged status as operations manager of radio station KCAB for a 10-month period in 1977 and that the ALJ's crediting of her experience (*see I.D.*, para. 27) was "[k]ey to the ALJ's decision. . . ."[8] In these exceptions, River Valley uses mostly spent bullets, and its allegations with respect to Judy Purtle's past broadcast experience raise no significant or material questions of fact.[9]

4. As evidence of Purtle's purported dishonesty concerning her claim to have been the operations manager for a 10-month period, River Valley relies upon the FCC Annual Employment Reports (Forms 395) filed by her employer during the relevant period (1974–1981);[10] it also invokes the testimony of three former KCAB

[7] *See, e.g.*, River Valley Exceptions at 4–19, 26. The 1965 *Policy Statement, supra*, affords qualitative credit for these applicant attributes, *see* 1 FCC 2d at 395–96.

[8] River Valley Exceptions at 4.

[9] For example, River Valley brings to our attention:

> Ms. Purtle demonstrated a marked inability to distinguish between titles. Thus she said the positions of 'office manager' and 'business manager' were 'basically the same.' Nor did she distinguish between an 'assistant *to* a general manager' and an 'assistant manager.' Similarly, she did not consider the position of 'Operations Manager' any more prestigious or important in this proceeding than that of 'Office Manager.'

*Id.*, at 5 n.1 (transcript citations omitted). Its picayune carping here suggests strongly that River Valley counsel has had insufficient experience with smaller radio stations where, from time-to-time, almost any warm body might be impressed to be anything from "chief cook" to "bottle washer" and where, frequently, the only titles of internal significance are those to the tower and/or transmitter site and the studio quarters, it being nicer to own than to rent. Job titles can be useful indicators of vocational functions, *see, e.g.*, *Policy Statement*, 1 FCC 2d at 395; but *actual* functions are much more important in the long-run. *Cf. Central Texas Broadcasting Co.*, 90 FCC 2d 583, 598 (Rev. Bd. 1982)(separate statement of Bd. Mb'r Jacobs), *recon. denied*, 52 RR 2d 1383.

[10] River Valley Exceptions at 7–12. The ALJ rejected the introduction of these forms into evidence and River Valley excepts to this rejection. *Id.*, at 9. We agree completely with River Valley that the ALJ erred in refusing to admit copies of these official forms into evidence; the evidence was relevant and probative. It was also admissible. Fed. R. Evidence § 1005. However, the data in such forms is neither conclusive nor does it create any decisional presumptions. Considering

employees.[11] With respect to the Forms 395, River Valley contends that these showed no listing of a female in a management capacity. And, the testimony of three former co-employees, it contends, conflicts with Purtle's description of her KCAB functions. Purtle replies;[12]

> During the past nine years, Purtle was in charge of the station's traffic and accounting departments; supervised programming; directed the training of announcers, news people and engineers; determined what programming to air and what music to play; kept inventory checks on equipment and music; obtained music from record companies; managed in-coming and out-going mail; handled daily and weekly sales and collection reports, the public file and the political file; handled bookkeeping; prepared and reviewed program logs; posted accounts receivable and payable; sold commercial spots; prepared substantial portions of the stations' license renewal applications; and participated in the stations' ongoing ascertainment effort.

These assertions are factually unrebutted and the testimony and evidence invoked by River Valley do no more than suggest that—in describing her prior experience—Purtle was uninhibited by modesty. The record evidence does not shake Purtle's basic claims as to her KCAB functions and it adequately affirms Purtle's entitlement to the enhancement of past broadcast experience which, in any event, the Commission has described as "not so significant as local residence" and merely of "some value."[13] While Purtle's local civic activities have not been nearly as extensive as some applicants we have seen,[14] her activities combined with her long-time Russellville residence do "indicat[e] a knowledge of an interest in" the community.[15] River Valley's exceptions on that score are essentially rejected and Purtle is entitled to some enhancement, though slight, for community activities.

5. As noted previously, River Valley also excepts in the strongest terms to the ALJ's determination that Almer Jackson, a 15% owner of the applicant entity, was "untruthful" with respect to his academic achievement and that his untruthfulness, in pertinent part, rendered River Valley's integration proposal "qualitatively subaverage."[16] This disputation emanates from Jackson's represen-

---

that, as well as the other evidence and testimony in this case supporting Purtle's KCAB experience, the error here was harmless.

[11] *Id.*, at 13–17. River Valley also submits (without substantiation) that Purtle's two awards as KCAB "Employee of the Year" and her "sundry managerial titles" were the product of "a romantic relationship which started in 1973 and ended in 1976." *Id.*, at 18.

[12] Purtle Reply at 8 (*citing to* Purtle Exh. 1; Tr. 227–30; 234; 238–50; 256–70; 350–54). We have closely reviewed the transcript and record and find no genuine basis for contesting these descriptions.

[13] *See Policy Statement*, 1 FCC 2d at 396.

[14] *See I.D.*, paras. 30–31.

[15] *Policy Statement*, 1 FCC 2d at 396.

[16] *I.D.*, paras. 17–18; Conclusions, para. 19. *But see supra* note 6 (certain other ALJ "findings" re Jackson gratuitous and irrelevant).

tation that he held a Bachelor of Arts degree from Arkansas Tech University.[17] However, Purtle produced a notarized letter, under seal, from the university's Registrar, Charles Shelton, indicating that its records did not reflect a degree awarded to Jackson.[18] River Valley objected at hearing to the introduction of this document as hearsay; but the ALJ accepted it[19] and River Valley excepts to that action here.[20] The ALJ accepted the document under Fed. R. Evidence 902 (self-authentication).[21] We believe that the document was admissible as reliable under the hearsay exceptions since the likelihood of forgery here is infinitestimal, if not under Rule 902 alone than certainly in conjunction with Rule 903,[22] *see generally* D.W. Louisell & C.B. Mueller, *Federal Evidence*, §§ 543–44 (1981); *cf.* Rule 803(6), (8) and (24), but the issue is effectively moot since River Valley admits that Jackson needed further academic course credit for a B.A. degree.[23] River Valley asserts: "Jackson simply misspoke when he equated completion of degree requirements with the completion of courses in his major field of study. It is obvious they are not the same. . . ."[24]

6. River Valley argues that there is "confusion in Jackson's testimony about his college experience" and that "while Mr. Jackson could have been more careful in his written statement [River Valley Exh. 5], the critical point, his *intention* to be forthcoming, was evident from his live testimony."[25] But, the only confusion apparent here is that sought to be injected by the *post-hoc* rationalizations of counsel; indeed, it is Jackson's "live testimony" itself demanding that his further courses had "nothing whatsoever" to do with his B.A. degree (*see supra* note 17), while River Valley now concedes that

---

[17] River Valley Exh. 5, at 1; *see also* Testimony of Almer Jackson (Tr. 162):

> Q. * * * Did you in fact receive a degree from Arkansas Tech?
>
> A. Yes, I did.

Jackson further stated that he had completed "[a]ll the courses that were necessary for the degree" but that he "needed a three hour expansive [elective] course" that "had nothing whatsoever to do with my degree itself." *Id.*

[18] Purtle Exh. 5.

[19] Tr. 442–47.

[20] River Valley Exceptions at 28–29.

[21] *See* Tr. 443–446. Commission Rules require that hearings be conducted according to "the rules of evidence governing [federal] civil proceedings in matters not involving trial by jury. . . ." 47 CFR § 1.351.

[22] Fed. R. Evidence 903 provides:

> The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

[23] River Valley Exceptions at 29–30.

[24] *Id.*, at 30.

[25] *Id.* (Emphasis in original.)

further course work was a B.A. prerequisite, that underscore the patent contradiction.[26] Thus, the ALJ's finding that Jackson's claim to a B.A. degree was "false"[27] is accurate. We acknowledge that there is energy in Justice Jackson's dictum that "willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones." *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 227 (1946). However, Jackson's useless fib (Almer's, that is) was, unlike the subject misstatement in *WOKO*, unrelated to any matter of FCC regulatory interest;[28] and, even in cases where a relevant misstatement is perceived, Judge Mikva has taught that although an applicant may have slipped slightly on the forthcomingness index, absolute disqualification is not mandatory.

> There is no doubt that the Commission could have evaluated the character issue [misrepresentation] in the measured forum of a comparative hearing. Demerits could have been assessed against WADECO for whatever it did wrong or did not do right.

*WADECO, Inc.* v. *FCC*, 628 F.2d 122, 133 (D.C. Cir. 1980) (dissenting statement) (footnote omitted). Both the Board and the Commission have given life to that juridical enjoinder, *see Fox River Broadcasting, Inc.* , 88 FCC 2d 1132 (Rev. Bd. 1982), *modified* 53 RR 2d 44, 46 (1983) (Comm'n) ("we concur in the Board's imposition of a slight comparative demerit against [applicant] based on [principal's] lack of care in making his statements. . . ."), *recon. denied,* FCC 83I–43, released April 20, 1983. We believe that - just as in *Fox River* - while Jackson's claim to a college degree "goes beyond 'exaggeration' and 'puffing' [*citing to John C. Roach* , 43 FCC 2d 685, 689 (Rev. Bd. 1973)] . . . it does not stretch far beyond that ambit." 88 FCC 2d at 1143. In view thereof, we agree with the ALJ's implicit holding that no absolute disqualification is warranted and that, to the extent that his "qualitative" penalization of River Valley[29] is coextensive with a very slight demerit, we find no decisional error.

---

[26] River Valley asserts:

> However, long before the purported registrar's letter was ever introduced, it was Jackson himself who volunteered in the context of a question as to completed degree requirements, that he 'needed' another three hour elective; *a course which he erringly said was unrelated to his degree.*

River Valley Exceptions at 29–30. (Emphasis added.)

[27] *I.D.*, para. 18.

[28] We nevertheless disagree with River Valley's argument that no censure should occur because Jackson had no apparent motive to deceive the Commission. River Valley Exceptions at 33. Motive is merely a clue in the cogitative process employed to deduce to the potential falsity of a claim or fact; it is not the end-product. Here the falsity is manifest.

[29] *I.D.* , Conclusions, para. 19.

## MINORITY/FEMALE OWNERSHIP

7. In its exceptions, River Valley contends that Purtle's female ownership is not entitled to as much enhancement merit as its black ownership because case law and Commission policy have stressed minority ownership while, at best, giving female ownership only token consideration.[30] In our *Certification Order* , we acknowledged that comparative recognition of female ownership apparently germinated from Review Board dictum in *Mid-Florida Television Corp.* , 69 FCC 2d 607 (Rev. Bd. 1978), *vacated* 87 FCC 2d 203 (1981) (Comm'n). Although stating that "the need for diversity and sensitivity reflected in the structure of a broadcast station is not so pressing with respect to women as it is with respect to blacks - women have not been excluded from the mainstream of society as have black people," 69 FCC 2d at 652, the *Mid-Florida* Board nevertheless ventured:

> We hold that merit for female ownership and participation is warranted upon essentially the same basis as the merit given for black ownership and participation, but that it is a merit of lesser significance. The basic policy considerations are the same. Women are a general population group which has suffered from a discriminatory attitude in various fields of activity, and one which, partly as a consequence, has certain separate needs and interests with respect to which the inclusion of women in broadcast ownership and operation can be of value.

*Id. Mid-Florida* was followed by the Board in *Alexander S. Klein, Jr.* , 69 FCC 2d 2134, 2147 n.26 (Rev. Bd. 1978) ("Female ownership and participation warrants only a slight merit . . . less significant than black ownership and participation"), *aff'd* 86 FCC 2d 423 (1981),[31] and in *Radio Gaithersburg, Inc.* , 72 FCC 2d 820, 829 (Rev. Bd. 1979) ("the credit awarded for female participation is less than that accorded black participation"), *review denied* FCC 80–734, released December 4, 1980 (mem.), *aff'd per curiam without opinion* , D.C. Cir. No. 81–1028, October 19, 1981.

8. Our *Certification Order* also observed that, at about the same time the Board was deciding the foregoing cases, the Commission itself was contemplating the question of whether or not to include female ownership under certain preferential treatment devices it then was fashioning to increase minority ownership (discussed more fully *infra* , paras. 11–12), but decided:

> . . . we have not concluded that the historical and contemporary disadvantagement suffered by women is of the same order, or has the same contemporary consequences, which would justify inclusion of a majority of the nation's

[30] River Valley Exceptions at 19–26; Supplemental Brief at 4–10.

[31] Although, in affirming *Klein* , the Commission cursorily referenced the Board's treatment of "minority and female ownership-participation," 86 FCC 2d at 429, the Commission's decision may be read to have turned on minority ownership alone, *see id.* , at 430–432.

population in a preferential category defined by the presence of 'minority groups.'

*Minority Ownership of Broadcast Facilities* , 69 FCC 2d 1591, 1593 n.9 (1978).[32] At the time our *Certification Order* was issued in this case, it seemed therefore that the thrust for preferential recognition of female ownership was fueled by "Review Board law," and so we sought affirmation and clarification from the full Commission.

9. Such affirmation was not long in coming, for shortly after the release of our November 26, 1982 *Certification Order* the Commission issued variegated statements which ratified the female preference first suggested by the *Mid-Florida* Board. Most important, perhaps, is the language of the *Remand Order* in this very case which declared that "[w]e have previously stated our commitment to fostering greater participation by minorities and women in broadcasting."[33] Presaging that declaration was the Commission's December 1, 1982 release of its decision in *Waters Broadcasting* (later cited in the *Remand Order* , *see supra* note 33) in which it held that the winning applicant was entitled "to a substantial enhancement for its 100% minority and female ownership integrated with full-time management." 91 FCC 2d at 1266. What is more, and as possibly distinguished from its decision in *Klein* , *supra* , the Commission gave isolated recognition to female ownership in *Waters* by noting that the losing applicant's "enhancement for 24% [minority] female ownership integrated with full-time management is substantially less." 91 FCC 2d at 1266. Further indications followed. Thus, on the same day the Commission issued its *Remand Order* herein, it affirmed without opinion the Board's decision in *North Carolina Radio Service, Inc.* , 52 RR 2d 993 (Rev. Bd. 1982), where the sole comparative distinction between the competing applicants was the winner's 49% (non-minority) female integrated ownership.[34] And, the Commission has lately represented to the U.S. Court of Appeals in unequivocal terms: "Female ownership is also considered an

---

[32] In that same footnote 9, however, the Commission apparently took tacit recognition of the Board's 1978 decisions in *Mid-Florida* and *Klein* , *supra* (which had been issued just several months before the Commission issued its 1978 *Minority Ownership* document, *supra* ), and it indicated that it "has, in appropriate factual circumstances, recognized female involvement as contributing to potential diversity of programming and awarded merit in a comparative proceeding on that basis."

[33] *Remand Order* , at n.5, *citing* both the aforecited footnote 9 of its 1978 policy statement on *Minority Ownership* and *Waters Broadcasting Corp.* , 91 FCC 2d 1260 (1982) (hereinafter "*Waters* "), *reversing on other grounds* 88 FCC 2d 1204 (Rev. Bd. 1981), *appeal docketed sub nom* . *West Michigan Broadcasting Co.* v. *FCC* , No. 82–2513 (D.C. Cir. 1983).

[34] *See Order* , FCC 83–211, released May 3, 1983 (mem.).

enhancement factor but is entitled to lesser weight than minority ownership."[35] Finally, two Commissioners have very recently voiced their view that significant preferences ought to be accorded to female ownership *per se* under the lottery scheme authorized by Congress for awarding licenses for, *inter alia* , low power television stations;[36] and, it seems, the Commission may soon release a notice proposing for comment just such a female lottery preference.[37]

10. Hence, and as we apprehend this dynamic policy area, distaff ownership is now brightly fixed in the constellation of preferences, credits, enhancements and merits that light the distance to our ultimate destination, the comparative "Star." The weights and measures appending many of those "pulses" are outlined in the 1965 *Policy Statement*, *supra*, and - in the Anglo-Saxon tradition of the common law incorporated into the American system of jurisprudence - highlighted by the application of implemental policy standards in an ever-expanding galaxy of case law precedents. This adjudicatory means of developing comparative standards was expressly anticipated by the Commission:

> We pointed out at the outset that in the normal course there may be changes in the views of individual Commissioners as membership on the Commission changes or as Commissioners may come to view matters differently with the passage of time. Therefore, it may be well to emphasize that by this attempt to clarify our present policy and our views with respect to the various factors which are considered in comparative hearings, we do not intend to stultify the continuing process of reviewing our judgment on these matters. Where changes in policy are deemed appropriate they will be made, either in individual cases or in further general statements, with an explanation of the reason for the change. In this way, we hope to preserve the advantages of clear policy enunciation without sacrificing necessary flexibility and open-mindedness.

*Policy Statement*, *supra*, 1 FCC 2d at 399. The choice of enunciating

---

[35] Brief for FCC in *West Michigan Broadcasting* (*Waters* ), *supra* note 33, filed April 29, 1983, at n.2 (*citing to* the Board's 1979 decision in *Radio Gaithersburg* , *supra* ).

[36] *See Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings* (hereinafter "*Competing Applications Using Random Selection* "), 53 RR 2d 1401, 1438 (1983) (separate concurring statements of Comm'rs Jones and Dawson). *But see* Concurring Statement of Chm'n Fowler (*id.* , at 1435–1437) (opining that governmental preferences based on biological differences may be constitutionally infirm and, in any event, undersirable public policy).

[37] *See id.*, Concurring Statement of Comm'r Dawson. Commissioner Dawson's view is that although the new lottery statute authorizes special preferences for "minority group" applicants (*see* 47 U.S.C. § 309(i)(3)(A), as amended by Pub. L. 97–259 (1982)), and no specific mention is made of women in the statutory definition (*see id.*, at § 309(i)(3)(C)(ii)), Congress did not intend its "minority group" definition as words of limitation. We also note that Commissioner Dawson adverted to the recent recognition of female ownership in comparative licensing cases (*citing Waters*, *supra*), but remarked that such recognition was perhaps "not a well-defined one." Concurring Statement, at n.2.

public policy through either rules and policy statements - Code Law, in the Napoleonic tradition - or through case-by-case adjudication is an election which lies "primarily in the informed discretion of the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). The emphasis on particular applicant attributes chosen by the Commission to be considered as positive comparative factors flows from its daily administration of the "public interest" standard of the Communications Act,[38] a lodestar that has been described as "'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.'" *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 593 (1981), *quoting FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). The bulwark against arbitrary or capricious shifts of policy standards is consistency with prior precedent or a reasoned explanation for departure. *See generally Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971) (agency has a duty to provide "an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law"). Although we are unaware of any independent Commission exposition on the rationale supporting a female ownership preference, it may now be assumed more confidently that the Commission has adopted the *ratio decidendi* of the Board's *Mid-Florida* discussion set out in para. 7, *supra*. The very recent Commission pronouncements ratifying an enhancing merit for female ownership, and referenced in the paragraph immediately above, reflect a policy bent now luminously discernible. Purtle, a 100% female-owned applicant, is therefore entitled to a solid, qualitative integration enhancement.

11. Ascending in parallel to the Commission's heightening recognition of integrated female ownership is the dimension of the weight to be accorded various levels of minority ownership. Thus, while a limited level of minority ownership might tip the comparative scales in an almost deadlocked case, *see, e.g.*, *Klein*, *supra*, 86 FCC 2d at 431, it appears increasingly evident that the Commission's grants of preferential treatment are linked firmly to minority "control." For example, in *Competing Applications Using Random Selection*, *supra* note 36, the Commission restricted the statutorily-mandated minority preference to those lottery participants whose minority owners hold "a majority interest." 53 RR 2d at 1420.[39]

[38] 47 U.S.C. §§ 301, 303 309(a), 310(d).

[39] In so doing, the Commission was tracking Congressional intent as expressed in the Conference Report accompanying H.R. 3239, which legislation matured into the minority lottery preference now set forth in § 309(i) of the Communications Act (*see* 96 Stat. 1087). That Report stated:

> The Conferees intend that in the administration of a lottery to be used for granting licenses or construction permits for any media of mass communications,

Similarly, even while expanding its opportunities for minority preferences in its recent *Minority Ownership In Broadcasting*, 52 RR 2d 1301 (1982) (hereinafter "*Minority Ownership II*") by permitting the issuance of an IRS tax certificate (*see* 26 U.S.C. § 1071) or permitting a "distress sale"[40] where the minority "general partner" owns more than 20% of the entity and the non-minority entrepreneurs are "limited" partners, the Commission retained its previous requirement for minority control. *See id.*, at 1305–07; *see also id.*, at 1307–09, where the Commission indicated that it would now permit non-minority owners to receive a tax certificate for a deferred sale of their ownership shares if, in general, the sale does "not reduce minority ownership of and control in the entity below 51 percent."

12. The Commission's concentration on minority control as a prerequisite to the preferential devices of tax certificates or "distress sales" is embodied in *Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978) (hereinafter "*Minority Ownership I*"), *clarified*, 44 RR 2d 479 (1979). Therein, the Commission stated that these devices could be extended where "a sale is proposed to parties with a significant minority interest to determine whether there is a substantial likelihood that diversity of programming will be increased," 68 FCC 2d at 983; it quantified that "likelihood" by stating that "[w]e currently contemplate issuing a [tax] certificate where minority ownership is in excess of 50% or controlling," *id.*, at n.20.[41] To the same effect is *Clear Channel AM Broadcasting*, 78 FCC 2d

---

the Commission award a significant minority ownership preference to those applicants, a majority of whose ownership interests are held by a member or members of a minority group.

Rep. No. 97–765, 97th Cong., 2nd Sess. 44 (1982).

[40] A "distress sale" permits a licensee about to face a hearing to determine whether its license should be lost to sell out at a "discount" price (*i.e.*, 75% of market value, *see Grayson Enterprises, Inc.*, 77 FCC 2d 156, 164 (1980)). For a more complete discussion of the "distress sale" mechanism, *see Stereo Broadcasters, Inc.* v. *FCC*, 652 F.2d 1026 (D.C. Cir. 1981) (*aff'g* "distress sale" procedure; but not necessarily minority preference policy, *see* 652 F.2d at 1029 and concurring statement of Judge Nichols, *id.*, at 1032).

[41] The Commission's contemplated 50% prerequisite was effectuated with rigor. *See Long-Pride Broadcasting Co.*, 48 RR 2d 1243 (1980), where it denied a tax certificate to a transferee which was 45% minority owned, even though the minority owner also held a voting trust over another 10%; it held that the transferee's minority interest was insufficiently "significant," *id.*, at 1244, and further held that "minority ownership in excess of 50%" would be the benchmark, *id.*, at 1245.

The *Long-Pride* rationale was reflected, in part, in our recent *HLD&M Communications*, 53 RR 2d 732 (Rev. Bd. 1983), where we held that 45% minority ownership, although integrated, was less than controlling and therefore insufficient to "determine whether there is a substantial likelihood that diversity of programming will be increased." *Minority Ownership I*, 68 FCC 2d at 983. The award in *HLD&M* went to a 100% integrated competing applicant on the basis of comparative superiority. *See also Las Misiones De Bejar Television Co.*, 53 RR 2d 119 (Rev. Bd. 1983).

1345, *recon. granted in part and denied in part*, 83 FCC 2d 216 (1980).[42] Therein, the Commission amended its rules to permit the acceptance of applications for AM stations in the larger cities where "more than 50% of the ownership interest . . . is held by minority persons. . . ." 78 FCC 2d at 1369; *see also* 47 CFR § 73.37(e)(2) (rules).

13. In view of the foregoing, it appears to us that the general threshold for awarding any significant comparative qualitative enhancement for integrated minority ownership should be set at a more-than-50% (or otherwise controlling) interest level to ensure the "substantial likelihood that diversity" of viewpoints will be increased. *Minority Ownership I, supra*, 68 FCC 2d at 983; *see also Minority Ownership II, supra*; *Clear Channel, supra*; *Long-Pride, supra* note 41. Although a lower level of integrated minority ownership may be decisional in otherwise deadlocked cases, *see, e.g., Klein, supra*, an applicant with less than controlling integrated minority ownership cannot expect to be preferred over a comparatively superior applicant. *HLD&M Communications, supra*. The same general threshold would be appropriate, of course, with respect to comparative merit for female ownership.[43] To do otherwise would

[42] The general tenets of the *Clear Channel* rulemaking were affirmed *sub nom. Loyola University* v. *FCC*, 670 F.2d 1222 (D.C. Cir. 1982). The minority preference aspect of the new clear channel rules was reiterated by the Commission in *Bunkfeldt Broadcasting Corp.*, 88 FCC 2d 1696 (1982), *aff'd per curiam without opinion*, D.C. Cir. No. 82–1212, decided January 6, 1983, *petition for writ of certiorari*, No. 82–1607, filed March 30, 1983.

[43] Affirmation of this principle is found in *Waters* where the Commission stated that its "minority ownership policy is to be given full application and significant weight in comparative broadcast proceedings." 91 FCC 2d at 1266.

It concluded that "Waters is also entitled to a *substantial enhancement* for its *100% minority and female ownership* integrated with full-time management," *id.* (emphasis added), thus instructing necessarily that a lower ownership interest should receive a proportionately lower enhancement value. Indeed, in reviewing the doctrinal base for minority ownership preferences, the *Waters* Commission specifically invoked *Minority Ownership I* and *Clear Channel*, the preferential mechanisms of which are tautly tied to minority control.

We do note, however, that at one time the Commission contemplated adding more specificity to the comparative measure to be accorded minority ownership, and stated:

> *Minority Involvement in Applicants Involved in Comparative Proceedings.* We believe minority ownership involvement should continue to be a significant factor in comparative evaluations of applicants for broadcast authorizations, and are actively examining methods to rationalize such consideration of this issue as well as refining the comparative hearing and decision process generally. However, we believe a more appropriate resolution of NTIA's proposals in this area will be to consider them as part of our review of the broad comparative process.

*Minority Ownership of Broadcast Facilities, supra*, 69 FCC 2d at 1595–96 (footnote omitted). Until such time, case-by-case analysis is appropriate. *S.E.C.* v. *Chenery Corp., supra*.

be to entreat endless "qualitative" comparisons of fractional ownership levels (*e.g.*, 30% female *v.* 20% minority - or *vice versa*), none of which, as the Commission has clearly indicated, bode especially meaningful as auguries of viewpoint diversity. Against that premise, River Valley's 15% minority ownership is comparatively insignificant in this case and warrants little, if any, preferential consideration.[44]

## SUMMARY AND CONCLUSIONS

14. Purtle is a fully qualified applicant, qualitatively enhanced in the manner generally described by the ALJ, *see I.D.*, Conclusions, paras. 8–11. Additionally, in light of the Commission's unambiguous ratification of a comparative merit for female ownership, we likewise accord with the ALJ's conclusion that "Judy Purtle's 100% integration proposal is greatly enhanced by her own female participation as the Station's General Manager." *Id.*, at 12. River Valley's exceptions to these aspects of the *Initial Decision* have been rejected. Hence, for the reasons more fully set forth hereinabove, River Valley is found comparatively inferior even if *arguendo* we assess no demerit whatsoever for the inopportune misstatements of its minor principal.[45] Its 15% minority ownership, as we have said, cannot compete under our amplified comparative criteria with Purtle's qualitative attributes, even if we lightened somewhat the enhancement for her past broadcast experience and her civic participation that the ALJ factored into his ultimate conclusion. *See id.*, at para. 23.

15. ACCORDINGLY, IT IS ORDERED, That the application of Judy K. Purtle (File No. BPH-800807AE) IS GRANTED, and the applications of Horne Industries, Inc. (File No. BPH-11185) and River Valley Broadcasting, Inc. (File No. BPH-800711AJ) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

---

[44] As with all factors which enhance integration (*e.g.*, local residence, civic activities, past broadcast experience), the enhancement drops off sharply in proportion to the ownership level. *See generally Policy Statement*, 1 FCC 2d at 395–96.

[45] Because Almer Jackson holds only a relatively insignificant interest in River Valley, thus entitling it to only passing recognition for minority ownership, equilateral justice would dictate that any comparative demerit for Jackson's misstatements would be of commensurate scale.

Bankruptcy
Control, Transfer of, Procedures
License, Assignment of, By Receiver in Bankruptcy
License, Assignment of, Involuntary
License, Assignment of, Procedures
Trustee in Bankruptcy

While the Commission has a general policy of not questioning the appointment of a receiver or trustee in bankruptcy by state and federal courts, where such an appointment involves the enforcement of a reversionary interest in a broadcast license and the recognition of a security interest in that license by creditors, the application seeking consent to assign the broadcast license to receiver or trustee is unacceptable for filing.
*–Kirk Merkley*

FCC 83–310

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| KIRK MERKLEY, RECEIVER | File No. BAL- |
| For Involuntary Assignment of License of Station KPRQ, Murray, Utah.* | |
| KIRK MERKLEY, RECEIVER (Assignor) | |
| and | |
| TRI-ALPHA BROADCASTING CORPORATION (Assignee) | File No. BAL- |
| For Assignment of License of Station KPRQ, Murray, Utah. | |
| MURRAY BROADCASTING COMPANY, INC. | File No. BR-800529UY |
| For Renewal of License of Station KPRQ, Murray, Utah. | |

MEMORANDUM OPINION AND ORDER

(Adopted: June 29, 1983 Released: July 11, 1983)

* The call letters for station KPRQ were recently changed to KLAF. For ease of reference and to facilitate an understanding of the pleadings, the former call letters, KPRQ, have been used throughout this document.

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. The Commission has before it for consideration: (1) an FCC Form 316 application for the involuntary assignment of the license of station KPRQ(AM), Murray, Utah, to Kirk Merkley, Receiver, which has not been accepted for filing; (2) a contingent application to assign the license from the Receiver to Tri-Alpha Broadcasting Corporation, which has also not been accepted for filing; (3) objections to the acceptance for filing of these assignment applications by Murray Broadcasting Company, Inc. (MBC), licensee of KPRQ; (4) an application for the renewal of the license of station KPRQ filed by MBC; (5) an informal objection to the renewal application filed by the Receiver; and (6) various related pleadings.

*Preliminary Matters*

2. The Receiver argues that MBC's objection to the acceptance of his involuntary assignment application is an unauthorized pleading. Specifically, he contends that the pleading is in the nature of a petition to deny and that, under the Communications Act and Commission Rules, such petitions against involuntary assignment applications are not permitted. Citing *McClatchey Newspapers, Inc.*, 63 FCC 2d 669 (1977), *Barnes Enterprises, Inc.*, 55 FCC 2d 721 (1975) and *Gulf Coast Radio, Inc.*, 45 FCC 1865 (1964), the Receiver maintains that MBC's pleading does not lie against his application as a matter of law, and even if it was found acceptable, the Commission has a policy of not permitting challenges to applications which have not been accepted for filing. *University of Tennessee*, 44 RR 2d 1082 (1978). Thus, the Receiver contends that MBC's submission should be dismissed without consideration. We find, however, that this proceeding presents an unusual set of circumstances in which it is appropriate to consider MBC's pleading on its merits as an informal objection, pursuant to Section 73.3587 of the Rules.

3. Before addressing the specific facts of this case, we will briefly review applicable communications policy so as to set the issues presented in proper perspective. The Commission has consistently held that a broadcast license, as distinguished from the station's plant or physical assets, is not an owned asset or vested property interest so as to be subject to a mortgage, lien, pledge, attachment, seizure, or similar property right. *See* Sections 301, 304, 309(h), 310(d), of the Communications Act, as amended, and Section 73.1150 of the Commission's Rules. *See also*, *Radio KDAN, Inc.*, 11 FCC 2d 934, *recon. denied* 13 RR 2d 100 (1968), *affirmed on procedural grounds sub nom.*, *W. H. Hansen* v. *FCC*, 413 F. 2d 374 (D.C. Cir. 1969). As stated in *Radio KDAN*, "This principle is firmly rooted in Commission practice, its rationale being that such hypothecation endangers the independence of the licensee who is and who should be

at all times responsible for and accountable to the Commission in the exercise of the broadcasting trust." 13 RR 2d at 102.

4. The Commission has had a rule prohibiting reversionary interests in broadcast licenses since 1949.[1] This prohibition is presently contained in Section 73.1150 of the Rules. This rule provides:

> (a) In transferring a broadcast station, the licensee may retain no right of reversion of the license, no right to reassignment of the license in the future, and may not reserve the right to use the facilities of the station for any period whatsoever.
>
> (b) No license, renewal of license, assignment of license or transfer of control of a corporate licensee will be granted or authorized if there is a contract, arrangement or understanding, express or implied, pursuant to which, as consideration or partial consideration for the assignment or transfer, such rights, as stated in paragraph (a) of this section, are retained.

In *KDAN*, we stated: "In interpreting the prohibition of reversions contained in . . . [Section 73.1150], the Commission has consistently refused to grant applications for transfer of control of a corporate licensee or for an assignment of a station license where a former owner or licensee has retained . . . a right or a power to regain the status of licensee through a reversion of stock control or the reassignment of the station license." 13 RR 2d at 102.

*KPRQ - Background*

5. On June 26, 1974, agreements were executed to assign the license for station KPRQ (then KMOR), from O. J. Wilkinson to Seagull Enterprises, Inc. Essentially, the agreements provided, in pertinent part, that Seagull Enterprises (Seagull) was to make a series of payments to Wilkinson in consideration of the sale of the station's assets and the assignment of its license. These agreements contained the following provision:

> DEFAULT BY BUYER. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within 90 days thereafter, the Seller, at his option, shall have the following alternative remedies:
>
> A. Seller shall have the right, upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the buyer agrees that the Seller may at his option *re-enter and take possession of said premises without legal processes as in its first and former estate*, together with all improvements and additions made by the Buyer thereof, and the said additions

[1] *But see Policy Statement and Notice of Proposed Rulemaking* (Gen. Docket No. 82–797), 52 RR 2d 1301 (1982), whereby the Commission is currently examining the appropriateness of modifying somewhat its general practice regarding reversionary interests.

> and improvements shall remain with the land, and become property of the Seller, the Buyer becoming at once a tenant at will of the Seller; . . . [Emphasis added].[2]

Before the Commission approved the assignment of the station license to Seagull, this provision was amended to eliminate the Seller's right to "re-enter and take possession of said premises without legal processes," *i.e.*, a right of reversion to the station and its license and to provide, as an alternative remedy in the event of a default, a "bona fide public sale" subject to prior Commission approval. The Commission approved the assignment on December 13, 1974.

6. Soon after being assigned the license, Seagull encountered financial difficulties. Consequently, it began to negotiate a sale of the station to an individual, Tim Themy. However, no agreement was reached and Seagull eventually defaulted on its payments to Wilkinson. Nonetheless, after Wilkinson began to exercise his rights under the default provision, Themy negotiated with Wilkinson and eventually acquired Wilkinson's rights under the 1974 contracts. Also, around this same time, Seagull executed an agreement to assign the station's license to Shirley K. Watson, doing business as Murray Broadcasting Company (MBC), and submitted an application to the Commission seeking approval of the license assignment.

7. Themy filed an objection to the Seagull-MBC assignment application, based upon the rights he had acquired from Wilkinson. Themy alleged that he was successor to the former licensee's interest in the station's real property and broadcast equipment and to the obligation of Seagull to make installment payments with respect to this property under the 1974 agreements. Themy stated that the proposed assignee of the license, MBC, had refused to accept responsibility for Seagull's financial obligations. He noted that he had filed a complaint in a local state court against Seagull and principals of MBC, as well as a creditor who also claimed a security interest in certain of the station's assets. In his complaint, he sought the appointment of a receiver and a determination that these parties had no right or interest in the bulk of the real and personal property used in the operation of the station.[3] Themy argued that MBC could not expect to use the Seagull equipment and property once his claims were executed. Consequently, he contended that MBC was only acquiring a bare license and that it had failed to show its financial qualifications for purchasing new broadcast facilities. Themy also expressed a concern that a grant of the assignment application

[2] There were two agreements involved in the assignment transaction, one involving the station's real property, the other concerning its remaining assets. The above provision was contained in both agreements.

[3] Themy's request for the appointment of a receiver was denied by the court. The other aspects of Themy's complaint were still before the court.

might substantially impair any possibility that Seagull's obligations would be paid.

8. MBC responded that it was attempting to negotiate a lease whereby it could use the properties which were subject to Themy's claims. It demonstrated further that, even if the broadcast equipment were ultimately foreclosed upon and unavailable, MBC possessed the funds necessary to purchase new facilities.

9. By letter of March 4, 1977, the Chief of the Broadcast Bureau, acting on delegated authority, granted the application assigning the license to MBC. In denying Themy's objections, the Bureau Chief concluded that MBC was not acquiring a bare license, but "an operating station with value as a going concern." The letter noted that Themy's objections to the assignment related to his private interests rather than public interest considerations. In denying the objection and granting the assignment application, the Bureau Chief applied the Commission's policy of not assuming jurisdiction in such private matters and stated that the appropriate forum for Themy's claims to the real and personal property of the station was the local courts. There was no evidence that Themy had sought, or was seeking, a court order to enjoin the sale to MBC pending disposition of his claims.

10. Subsequent to the assignment, MBC acquired new facilities, no longer using any of the property to which Themy claimed an interest.[4] Also, Themy continued his suit against MBC in the Utah state courts. For some unexplained reason, however, the original unamended security agreement containing the former licensee's right to take possession of the station was litigated. On November 2, 1977, the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, entered a summary judgment in favor of Themy based on the unamended default provision. This judgment provided in part:

> The interest of defendants Seagull Enterprises, Inc. . . . and Murray Broadcasting Company, Inc. *in the FCC license* described in and arising out of the Purchase Agreement for sale of the broadcasting equipment and license dated June 26, 1974, are forfeited by virtue of the default of the buyer thereunder. [Emphasis added.]

An appeal was taken to the Utah Supreme Court which affirmed the District Court's finding that KPRQ's license was forfeit. *Themy* v. *Seagull Enterprises, Inc.*, 595 P.2d 526, 45 RR 2d 775 (1979). The decision was remanded to the District Court, which appointed a receiver to seek the involuntary assignment of the KPRQ license.[5]

---

[4] Also about this time, the station's call letters were changed from KMOR to KPRQ. In addition, a *pro forma* assignment of the station's license was executed from Shirley Watson d/b/a Murray Broadcasting Company to Murray Broadcasting Company, Inc.

[5] After the appeal was taken but before the Utah Supreme Court rendered its

The Receiver also filed an informal objection to MBC's 1980 application for renewal of license. The current proceeding is to determine which party has a valid claim to the KPRQ license.

*Allegations*

11. MBC argues that the Receiver has no interest in any of KPRQ's assets except its license. It further contends that an assignment of the license alone would be contrary to a long-standing policy of not granting "bare" authorizations. It states that all the broadcast equipment involved in the Seagull-Wilkinson transaction has been placed in storage, subject to a series of garnishments by creditors and that the station is operating solely with MBC purchased equipment. Moreover, MBC argues that the Receiver has also sought the assignment of a non-broadcast license which has no connection to the agreements defaulted upon by Seagull.[6] Furthermore, MBC questions the Receiver's authority to seek KPRQ's license since he was designated to represent Themy, at a point when Themy had already disposed of his interests. See footnote 5 *supra*. For these reasons, MBC requests that the Receiver's application be either returned, dismissed or denied. In response, the Receiver argues that he is not just seeking the assignment of a "bare" license, but the acquisition of all assets associated with that license. He points out that the Utah Supreme Court found all the assets of Seagull, including the license as well as real and personal property, to be forfeited. The Receiver also argues that the Commission's rationale for denying Themy's informal objection to the Seagull-MBC assignment requires a grant of the current assignment application. He states, "Having referred Mr. Themy to the state courts to vindicate his rights, the Commission can not now turn a deaf ear to the judgment of those courts" (referring to the letter of March 4, 1977, from the Chief of the Broadcast Bureau). See paragraph 8 *supra*. Moreover, the Receiver emphasizes that Commission policy has been not to question the final judgment of state courts in appointing receivers. *H. Edward Dillon, Receiver*, 42 FCC 2d 203 (1973). Consequently, the Receiver requests that MBC's filings be dismissed due to their being based on a misconception of fact and an erroneous interpretation of the law.

12. In an informal objection to MBC's renewal application, the Receiver reasserts his interest in the KPRQ license and refers the Commission to his pending unaccepted assignment applications.

---

decision, Themy reassigned his rights back to O. J. Wilkinson (the former licensee). Subsequently, Wilkinson again assigned the rights to Harry J. Pappas, who then assigned them to Tri-Alpha Broadcasting Corporation. Consequently, the Receiver represents the interests of Tri-Alpha, on whose behalf he has submitted the second "contingent" assignment application.

[6] MBC states that the Receiver is also requesting assignment of KPRQ's license, Aural STLWCO 518, which was licensed to MBC after it acquired the station.

Consequently, he states, "while the question of Murray Broadcasting Company's legal qualifications to continue to operate KPRQ is in litigation before the Commission, the Commission should not prejudge the issue by acting on the pending application of . . . [MBC] for renewal of KPRQ's license."[7] In a memorandum requesting renewal of its license and dismissal of the assignment applications, MBC presents additional arguments challenging the Receiver's claims. MBC asserts that the Commission has exclusive power over the licensing of broadcast stations and that local state courts may take no action conflicting with or impinging upon the agency's authority. It states, furthermore, that based on this authority, the Commission has adopted rules which prohibit former licensees from holding reversionary interests in broadcast licenses as security. MBC then asserts that the Receiver's claim is based upon just such an interest. Specifically, MBC emphasizes that, according to the Utah Supreme Court, the Receiver's claim originated when Seagull forfeited the KPRQ license to Wilkinson, the original licensee of the station. MBC maintains that this forfeiture constituted a reversionary interest prohibited by Commission rules.

13. MBC also argues that the Utah Supreme Court committed an error of fact when it reviewed the agreements' default provisions. It states that the error further supports the conclusion that the Receiver is pursuing an improper reversionary interest. Specifically, it asserts that the court only reviewed the unamended agreements which provided the former licensee with the right to repossess the station in the event of default, and not the public sale remedy which was incorporated in the amended contract.[8] Thus, MBC contends that the original default provision containing the right to repossession, the one the court actually considered, had been amended for the very reason that it contained a reversionary interest and would not have received the Commission's approval. Consequently, MBC avers that the Commission is not required to give any weight to a state court decision which not only intrudes on the agency's licensing authority and results in a disposition which is contrary to its established policies, but that is also based upon a mistake of fact.

14. In response, the Receiver argues that the Utah Supreme

[7] In a letter of September 25, 1980, from the Chief of the Broadcast Bureau's Renewal and Transfer Division to the Receiver's attorney, notice was given that the KPRQ renewal would remain in deferred status pending resolution of the issues concerning the unaccepted assignment applications.

[8] See paragraph 5 *supra*. In its decision, the Utah Supreme Court only made one reference to the actual wording of the default provision. The court states: "Both documents [1974 sales agreements] were closely patterned after the Standard Uniform Real Estate Contract often used in this state; for example, both provided the seller with the same alternative remedies in the event of a breach by buyer: (1) seller could, after giving five days written notice, declare the interest of the buyer to be forfeited and take possession of the premises. . . ." 595 P.2d at 528, 45 RR 2d at 775.

Court did not exceed its jurisdiction in finding the KPRQ license forfeit. In support he cites *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945), for the proposition that a state supreme court may consider a contractual dispute affecting the disposition of a broadcast license, as long as it issues no order requiring the license's assignment. The Receiver states that in the current situation the Utah court only adjudicated the dispute between the parties and issued no order regarding the license itself. The Receiver, while admitting the court considered the wrong provision, also argues that the final versions of the 1974 sales agreements were not significantly different from those the court actually reviewed. He contends that the forfeiture provisions were identical and that only the remedy was changed in the amended version; *i.e.*, a public sale rather than repossession.

15. The Receiver further contends that, if we sustain MBC's position regarding reversionary interests, then no seller-secured party could protect itself in a broadcast assignment transaction. He states that, although real estate and personal property could be subject to security interests, the value of such assets alone without the related broadcast license would be greatly reduced. He also maintains that by ignoring the Utah court's decision, the Commission would be committing an action which would be "arbitrary, capricious and unreasonable warranting judicial review." Specifically, he argues that MBC would have the Commission decide whether the Utah Supreme Court is deprived of jurisdiction, while principles of comity and federalism require the agency to give the court due deference. He also maintains that the argument that the court reviewed the wrong default provision misses the point in that it only considered the issues of jurisdiction and forfeiture, not the actual remedy which should be imposed. The Receiver states that, in any event, the Utah courts should be given the chance of reviewing the correct agreement before MBC presses the issue before the Commission. He further contends that the several assignments of the Wilkinson interest qualify as a public sale under the amended default provision. Moreover, that even if the assignments do not qualify as such a sale, MBC is now barred by Utah law from raising it as an issue.[9] Consequently, the Receiver argues that a grant of the involuntary assignment application would serve the public interest.

---

[9] The Receiver attached to his pleadings a memorandum from Themy's Utah counsel, who argued his client's claims before the state supreme court. He admits that the court considered the wrong contracts, indicating that, inadvertently, the correct versions had not been submitted to the court for review. However, he argues that the differences between those the court reviewed and those with the amended default provisions would have made no difference to the disposition of the case. He also states that, in any event, MBC would probably be barred by the principles of equitable estoppel from raising the mistake to the court at the present time. As to the effect of the "public sale" provision, he states that Utah

*Discussion*

16. Generally, with respect to receivership proceedings, we do not question a court-appointed receiver's request for assignment of a license. *H. Edward Dillon, Receiver*, 42 FCC 2d 203 (1973). In cases of bankruptcy or general receivership proceedings, the Commission usually gives its consent to the temporary acquisition of the license by a trustee or receiver, pending disposition of station assets. We recognize that the operating authorization must usually accompany the physical assets, pending ultimate passage of all to a qualified applicant. This is to permit trustees or receivers to fulfill the obligations of their appointment and, in some cases, to assure the continued operation of the licensed facility. We find, however, that the current situation presents special circumstances warranting a departure from this general policy. First, unlike most receivership proceedings, the current licensee has not encountered severe financial difficulties requiring protection for its creditors. In fact, the broadcast assets of the present licensee are not the subject of the receivership proceeding. There appears to be no question that MBC is both successful and qualified to remain a Commission licensee. The issues at hand originated with MBC's predecessor in the license, Seagull. The assignment of the license from Seagull to MBC was approved in 1977 despite objections from the party then entitled to the contract rights this Receiver purports to protect. That party did not seek Commission or court review of that assignment or in any way seek to enjoin the sale of Seagull's interests to MBC pending state court resolution of his rights. Some two years elapsed between our assignment of the license from Seagull to MBC, and the filing of the application to assign the license to the present Receiver. Furthermore, as discussed below, we find that the Utah Supreme Court decision upon which the Receiver bases his claim was, by admission of the parties, based upon an incorrect contract containing a clause prohibited by FCC policy. Under the circumstances presented in this case, assignment of the license to the Receiver is inappropriate.

17. This case seemingly involves a conflict between state and federal law which requires consideration of the relationship between the Commission's disposition of an assignment application and the decision of a local state court which interprets an assignment contract. In *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945), the United States Supreme Court discussed this relationship in overturning a decision of the state supreme court in Nebraska. Under the facts of the case, the state court had found that Nebraska's law on

---

law does not indicate what constitutes such a sale. He states further that Themy, and the others who were assigned the Wilkinson interest, attempted to act in a manner which they felt was in accordance with what the Commission would consider a public sale.

fraud had been violated in the assignment of a broadcast license. Consequently, the state court ordered the parties involved in the transaction to seek the reassignment of the license back to the original licensee. The United States Supreme Court ruled on review that the state court had exceeded its jurisdiction by controlling the conduct of parties before the Commission and that the Commission was the ultimate arbiter of matters concerning the disposition of the license. 326 U.S. at 131. However, the Court also indicated that where there is a conflict of the Commission's licensing authority with the powers of a state court over local matters, attempts should be made to reconcile both interests. Thus, the Court recognized the Commission's responsibility to establish a nationally consistent licensing policy, while it also recognized the responsibility of local courts in enforcing state laws. In emphasizing the need for reconciliation, the Court observed that "if the State's . . . [laws] can be effectively respected while at the same time reasonable opportunity is afforded for the protection of that public interest which lead to the granting of a license, the principle of fair accommodation between state and federal authority . . . should be observed." 326 U.S. at 132. Therefore, while there is no question that the Commission has exclusive authority over a station's license, we are also charged with the responsibility of accommodating state law, where appropriate.

18. For this reason we have established procedures which acknowledge bifurcated authority in certain licensing areas. For example, where a licensee is accused of breaching a contract to assign its license, the determination of whether a breach occurred is left to a local state court. *Carnegie Broadcasting Co.*, 5 FCC 2d 882 (1966). The Commission does not possess the resources, the expertise or the jurisdiction to adjudicate such claims fully. *See Regents* v. *Carroll*, 338 U.S. 586 (1950). On the other hand, we have determined that limits on the ability of licensees to hold certain types of interests and engage in certain types of contracts are required under the Communications Act. Thus, we have adopted policies and procedures which have effectively limited the ability of licensees in these areas. One example of this is our treatment of reversions, discussed earlier. Another example is in the area of media ownership and the Commission rules limiting the interests which can be held in conjunction with broadcast properties. *See* Section 73.35; 73.240; 73.636; and 76.501 of the Rules. Thus, the Commission would not approve the assignment of a license which would cause a violation of its multiple or cross-ownership rules, regardless of the contractual power of a licensee to acquire such an interest under state law. Similarly, if an assignment application's related contract of sale violated existing rules or policies, we would withhold our approval until the problem was corrected. In this way, while the interpretation and enforcement of contracts are within the jurisdiction of state courts, the Commission has established certain public interest

limitations on a licensee's contractual authority and imposes these limits by withholding its approval of a pending assignment application. Moreover, through this procedure, conflicts between Commission policy and state laws can be avoided.

19. In 1974, Wilkinson and Seagull submitted their sales agreements to the Commission for review. As a consequence, the provision which we found constituted a prohibited reversionary interest, and which the Receiver now asks us to recognize, was eliminated with a more appropriate remedy substituted in its place.[10] Nonetheless, once a dispute arose, the parties apparently inadvertently commenced to litigate their rights under the contract as originally written. Thus, the effect was to circumvent the procedure established to assure that our policies and rules are observed. If parties were allowed to make one representation to the Commission, while a contrary course was pursued at a later time, in another forum, our obligation to review license assignment transactions under the Act would be thwarted. Consequently, we find that to acknowledge the Receiver's claim at this point would be inappropriate, not only because it is derived from a reversion, but because it also jeopardizes our prior consent procedure.

20. We also reject the Receiver's argument that there is little meaningful difference between the original assignment agreement, upon which the court acted, and the amended version, which the Commission approved. The change reflects a difference in the default remedies and this change has significant impact on the question of whether the provision violates Commission rules. Under the original agreement, the former licensee was given the right to regain control automatically of the station and its license. Under the amended version, it was provided that the parties to the agreement could "after public notice, offer the pledged assets at a bona fide public sale." Thus, in the latter version, no control or automatic reacquisition of the license by the former licensee was contemplated. For the Commission to now recognize the Receiver's right to the license through the enforcement of the original agreement's provision would be tantamount to a recognition of a vested security interest in the license itself. Clearly, this is contrary to established law and policy.

[10] The reversionary interest provision contained in the original Wilkinson/Seagull contract clearly contradicts existing FCC policy. First, and most importantly, it treats the broadcast license as the property of the former licensee, Wilkinson. The provision allows him to "take possession of the license, reestablishing him in his "first and former estate." Second, it provides Wilkinson a right to the license in excess of the license term. The agreements indicated that Seagull was to make payments over 180 months. Thus, since a default could take place at any time during that period, Wilkinson could essentially claim a right to to license for some fifteen years. Finally, the contract provisions also allow the former licensee to take control of the license without seeking prior Commission approval. Specifically, the agreements allow Wilkinson to take possession "without legal processes." *See* Section 310(d) of the Act.

Finally, we believe the argument that the court's disposition would have been the same had it reviewed the amended contractual provisions is speculative at best. Moreover, it is not a matter for resolution in this forum. *Regents* v. *Carroll*, 338 U.S. 586 (1950).

*Conclusion*

21. In view of the foregoing, we find that the Receiver's interest in the KPRQ license cannot be recognized, despite a judgment of forfeiture by the Utah Supreme Court. Consequently, the Receiver's assignment applications are unacceptable for filing and his informal objection to the renewal of license of station KPRQ will be denied. Finally, we find that the public interest would be served by a grant of MBC's renewal application.

22. Accordingly, IT IS ORDERED, That the informal objection by Murray Broadcasting Company, Inc., to the acceptance for filing of the above-captioned assignment applications, IS GRANTED.

23. IT IS FURTHER ORDERED, That the application for the involuntary assignment of station KPRQ from Murray Broadcasting Company, Inc., to Kirk Merkley, Receiver, and the contingent application to assign the license from the Receiver to Tri-Alpha Broadcasting Corporation, ARE UNACCEPTABLE FOR FILING.

24. IT IS FURTHER ORDERED, That the Receiver's informal objection to the renewal of license of station KPRQ, IS DENIED.

25. IT IS FURTHER ORDERED, That the license renewal application for station KPRQ, filed by Murray Broadcasting Company, Inc., IS GRANTED.

26. IT IS FURTHER ORDERED, That the Mass Media Bureau of the Commission shall send, by Certified Mail, Return Receipt Requested, a copy of this Memorandum Opinion and Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Frequency Allocation Rules
Interference, Cochannel
International Agreements

Commission reaffirmed grant of CP for AM station. Section 73.37(b)(2) of Commission's domestic allocation rules waived and international treaties not considered a bar to grant of construction permit.

*–Lares Broadcasting Corp.*
Docket No. 20969

FCC 82–233

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Application of | |
| LARES BROADCASTING CORPORATION | Docket No. 20969 |
| Lares, Puerto Rico | File No. BP-20119 |
| For Construction Permit | |

MEMORANDUM OPINION AND ORDER

(Adopted: May 12, 1983; Released: May 20, 1983)

BY THE COMMISSION:

1. Presently before the Commission is a proceeding originally involving the mutually exclusive applications of Radio Lares and Lares Broadcasters[1] who filed for construction permits for a new daytime only standard broadcast station to operate on 1200 kHz from Lares, Puerto Rico. When this case was designated for hearing on November 4, 1976,[2] the Commission was faced with the problem of possible mutual interference between the proposals of the competing applicants and a station operating in the Dominican Republic, HIBS, on the same clear channel, 1200 kHz frequency. The Commission then ruled that although interference from HIBS appeared likely, it would not reduce the Lares' "service area to an unsatisfactory level." In reaching this conclusion the Commission in effect waived Section 73.37(b)(2) of its rules.[3] At the same time it

[1] On July 7, 1977 the two applicants were granted approval of their request to merge into Lares Broadcasting Corporation and the Radio Lares application was dismissed. *Lares Broadcasting Corp.*, FCC 77M-1193.

[2] *Radio Lares*, FCC 76–960, released November 4, 1976.

[3] Under Section 73.37(b) of the Commission's rules an application for a new daytime only standard broadcast station, which will be the first AM facility in the

conditioned grant of any construction permit on the resolution of interference that might be caused to HIBS, a situation governed by international agreement. The Commission at that time also recognized the probability that the Dominican Republic had failed to give notification of the operation of Station HIBS and that the United States had priority use of the 1200 kHz frequency, as set forth in the North American Regional Broadcasting Agreement (NARBA) to which the United States and the Dominican Republic were both signatories.[4]

2. In denying a petition for reconsideration of the designation order,[5] filed by Pepino Broadcasters, Inc. (hereinafter Pepino or WFBA), an intervenor and licensee of Station WFBA, San Sebastian, Puerto Rico,[6] the Commission reiterated its intent to permit a conditional grant. At that time the Commission ruled that "preliminary engineering studies suggested that the potential interference problem was not incompatible with our public interest responsibilities and could probably be eliminated through negotiations with the government of the Dominican Republic."

3. Thereafter the Administrative Law Judge approved an agreement between the competing applicants authorizing the merger of Radio Lares and Lares Broadcasters into Lares Broadcasting Corporation (hereinafter Lares or WGDL). At the same time the Administrative Law Judge also certified two questions to the Commission which were resolved favorably to Lares.[7] The second of these questions[8] queried whether grant of a construction permit must await the outcome of negotiations with the Dominican Republic,

---

community of license, may be granted if there is no overlap between the 1 mV/m contour of the proposed facilities and the 0.05 mV/m contour of any co-channel station. Section 73.37(b) constitutes an exception to Section 73.37(a) and is designed to facilitate local AM broadcast service to as many communities as possible. *Report and Order on Amendment of Part 73 of the Commission's Rules*, 45 FCC 1515, 1524 (1964). Accordingly, the amount of permissible interference to be received by a new local AM station under 73.37(b) may be greater than that contemplated under Section 73.37(a). Since the Lares' station would be the first AM facility in its community, 73.37(b) is applicable to this case.

[4] NARBA is a regional agreement between contracting governments and is designed to minimize interference between the broadcast stations of signatory countries.

[5] *Radio Lares*, 63 FCC 2d 305 (1977).

[6] Pepino is a potential commercial competitor of the new Lares station but will suffer no electrical interference from that station. The license and assets of Pepino Broadcasters, Inc. were assigned to Mr. Luis Raul Perez-Perez effective February 28, 1982. Upon the death of Mr. Perez-Perez, Gloria Mendez vda. de Perez succeeded to the ownership rights of her husband. On March 29, 1982, Mrs. Mendez requested that she be substituted for Pepino Broadcasters, Inc. We see no impediment to granting Mrs. Mendez's unopposed request and we hereby authorize Mrs. Mendez to participate in this proceeding in lieu of Pepino Broadcasters, Inc.

[7] *Radio Lares*, FCC 77M-1193, released July 7, 1977.

[8] *Lares Broadcasting Corporation*, 69 FCC 2d 841 (1978), *reconsideration denied*, FCC 79–191, released April 10, 1979. The first question pertained to the meaning of the word "market" as used in the Commission's regional concentration of control rule

given the probable co-channel interference to and from Station HIBS. On this point the Commission reiterated its reliance on preliminary engineering reports indicating *de minimis* interference, the priority right to the use of the channel by the United States, and the lack of notification by the government of the Dominican Republic. Based on these considerations the Commission stated that "public interest factors already exist in this case warranting a waiver of Section 73.37(b)(2) regardless of the outcome of any negotiations with the Dominican Republic."

4. The presiding Administrative Law Judge subsequently granted a conditional construction permit to Lares and terminated this proceeding.[9] Pepino thereafter filed an appeal with the United States Court of Appeals for the District of Columbia Circuit, questioning whether the Commission acted properly in granting a construction permit before resolving all problems of co-channel interference.[10]

5. While preparing its brief in the case, counsel for the Commission discovered that the earlier referenced "preliminary engineering studies", were not part of the record. Accordingly, the Commission sought and was granted remand to address this deficiency.[11]

6. Upon further analysis the Commission thereafter issued a Memorandum Opinion and Order re-affirming its grant of a conditional construction permit to Lares.[12] Noting that the Dominican Republic was acting in contravention of the North American Regional Broadcasting Agreement (NARBA), by operating on a clear channel frequency allocated to the United States for priority use and by not giving the required notification of the operation of HIBS, the Commission held that this illegal operation should not be the basis for denying grant of a lawfully authorized station operating on the same frequency.[13]

7. Again the case returned to the exclusive jurisdiction of the court, with Pepino additionally seeking review of the Commission's

---

(Section 73.35). Pepino later based its appeal to the Court on the Commission's resolution of these questions, *inter alia*.

[9] *Lares Broadcasting Corporation*, FCC 78M-1596, released October 27, 1978, *appeal denied*, FCC 79R-20, released May 14, 1979.

[10] *Pepino Broadcasting, Inc.* v. *FCC*, Case No. 79–1614 (D.C. Cir.), filed June 13, 1979.

[11] *Order* dated December 19, 1979.

[12] *Lares Broadcasting Corporation*, FCC 80–540, released September 22, 1980.

[13] "Where the only question concerning the operation of a proposed United States station arises from the existence of a foreign station which has failed to comply with the applicable provisions of NARBA, as is the case here, we believe that sound public policy warrants the waiver of Section 73.37(b)(2). Thus, whether or not negotiations ultimately render the interference question moot, it is clear that the operation of a domestic broadcast station should not be precluded because of interference emanating from a foreign station which is required under NARBA to afford protection to the dominant Class I-A station on that frequency and which is operating in contravention of that treaty obligation." (Footnote omitted). *Lares Broadcasting Corp.*, FCC 80–540, released September 22, 1980.

September 22, 1980 reaffirmation order as well. During preparation for the latest phase of the court appeal, Commission counsel discovered evidence outside the record of this proceeding suggesting that the Dominican Republic's notification of operation had in fact been sent and accepted.[14] Because of the impact this might have on the pending court case, the Commission again sought and was granted limited remand to investigate the question.[15] Accordingly, on September 1, 1981, the Commission issued an order[16] directing the parties to address the questions of whether HIBS was operating in violation of NARBA and the rights HIBS might have for protection against interference from the proposed new Lares station.[17]

8. While this case was pending, the United States was simultaneously involved in negotiating a new international treaty which would establish an overall spectrum allocation scheme among all the countries of North, Central and South America. To effectuate this scheme representatives of all interested countries convened at Rio de Janeiro, Brazil, for a Region 2 Conference held November 9, 1981 through December 19, 1981. The participating countries understood that the plan to be adopted at the Conference would replace NARBA, but that unresolved differences would still be handled through mutual negotiations between the affected countries. Since it appeared that the provisions of NARBA would no longer be governing, the Commission sought comments on what effect the tentative new international agreement might have on future negotiations and the probable consequences of any new agreement on the existing construction permit. While the responses[18] satisfactorily addressed

[14] Notice was published in the Federal Register of August 11, 1976, 41 F.R. 33940 and read as follows: "Although not provided strictly in accordance with notification procedures, the Commission recognizes this as a valid notification."

[15] *Order*, dated July 28, 1981.

[16] *Lares Broadcasting Corp.*, FCC 81-402, released September 1, 1981.

[17] The specific question asked were as follows:

(a) Is HIBS now operating in violation of NARBA? If so, provide specific details concerning any engineering studies and other documentation supporting this conclusion.

(b) Does HIBS have a right under NARBA or otherwise to be protected against interference from the Lares proposal?

(c) Are negotiations with the Dominican Republic concerning this matter feasible and are they likely to result in resolution of the projected interference problem?

(d) Does the proposed Region II Conference have any impact on HIBS' present rights?

[18] On October 7, 1981 Lares and the Broadcast Bureau filed their respective responses, with the Broadcast Bureau filing on erratum on October 9, 1981. On November 9, 1981 Pepino Broadcasters, Inc. filed comments on the responses of Lares and the Bureau. Thereafter, Lares filed a reply to Pepino's comments on November 19, 1981.

the first two questions, they failed to provide sufficient insight into the effect of the tentative new agreement on this proceeding. The Commission's staff therefore solicited responses to twelve additional questions centering on the impact of the Agreement reached at the Region 2 Conference on the instant proceeding.[19]

9. Before addressing the question of whether a construction permit should be granted to Lares, it is important to note that the question of whether a proposed new domestic station will be receiving excessive interference from an existing foreign station is governed by the Commission's rules.[20] Conversely, the question of whether an existing foreign station will be receiving excessive interference from a proposed United States station is governed by international treaty.[21] This demarcation reflects an appreciation of the fact that our domestic allocation rules are not designed simply to protect existing domestic stations from interference caused by new proposals.[22] Those rules are also intended to insure that applicants for new stations do not propose a service that would be receiving destructive interference from an existing broadcast station, whether domestic or foreign. Accordingly, we must look to Section 73.37 of our rules to determine if WGDL will be receiving excessive interference from HIBS and to NARBA and its tentative successor to ascertain whether HIBS will be receiving interference in excess of limits prescribed by international treaty.

10. We address first the question whether our authorization of the Lares station would violate an international treaty by causing excessive interference to an existing foreign station, HIBS. An examination of the pleadings confirms that on June 28, 1976 the government of the Dominican Republic forwarded a letter to the United States containing certain information as to the operation of Station HIBS, San Pedro de Macoris, Dominican Republic on the 1200 kHz frequency. Although this letter failed to include all of the basic information required by NARBA, the Chief of the Broadcast Bureau caused to have published in the Federal Register a public

---

[19] *Lares Broadcasting Corp.*, FCC 82I-31, released April 5, 1982.

[20] *See* C.F.R. §73.37 n.3; *AM Station Assignment Standards*, 4 RR 2d 1567, 1572–1573 (1965).

[21] *Id.*

[22] It has been the Commission's practice to enforce strictly Section 73.37 as it pertains to the question of protecting the broadcast signals of existing stations. *In re Application of ICBC Corporation*, 89 FCC 2d 447 (1982), appeal pending *sub nom. ICBC Corporation* v. *FCC*, D.C. Cir. No. 82–1342; *Major Market Stations, Inc.*, 4 Rad. Reg. (P&F) 2d 650, 651 (1965). A proposal for a new service which causes interference within a protected contour will in fact not even be accepted for filing. On the other hand, the Commission has shown a greater inclination to waive its rules in those situations where the only pertinent question is the amount of interference to be received by the new station. *See Newcastle Broadcasting Corp.*, 1 FCC 2d 1124 (1965).

notice acknowledging the operation of HIBS on 1200 kHz from the Dominican Republic.[23] The responses of the parties also reveal that on March 31, 1977 the Commission formally objected to the technical operation of Station HIBS and that the Dominican Republic never responded to this objection.

11. In light of the information contained in the parties' latest pleadings, we conclude that events subsequent to the receipt of the Dominican Republic's June 28, 1976 letter effectively nullified any claim that the Dominican Republic might otherwise have had to operate on 1200 kHz under NARBA. First, the government of the Dominican Republic failed to supply the required supplemental information,[24] including the antenna systems being used, although such information was to be filed no later than 60 days after submission of the required basic information.[25] This failure rendered the June 28, 1976 preliminary notification absolutely null and void.[26] Second, when the United States formally objected on March 31, 1977,[27] it was officially notifying the Dominican Republic that the technical operation of HIBS was unsatisfactory and incompatible with the terms of NARBA. By so acting the United States further negated its earlier response to HIBS' incomplete notification.

12. Besides not giving proper notification, the very operation of HIBS is in violation of NARBA. Under the terms of that agreement the United States is entitled to interference free operation on the 1200 kHz frequency.[28] Unchallenged engineering studies provided by the Broadcast Bureau[29] and Lares[30] both indicate that HIBS' signal

---

[23] *See* note 14, *supra.*

[24] In light of subsequent deficiencies we need not address the question of the validity of the Dominican Republic's original "letter of notification."

[25] Supplementary information shall consist of the following: (1) call sign; (2) geographical location of the midpoint of the antenna system in degrees and minutes of latitude and longitude; and (3) additional information depending on whether a directional or omnidirectional antenna system is to be used. NARBA, Part III, Section F, para. 2(a)(2), Current Service RR 41:16.

[26] "Any . . . notification of a new broadcasting station assignment or of a change in an existing broadcasting station assignment shall cease to have any effect if, within the period specified [60 days] in paragraph 2 of this Section F, the supplementary information shall not have been supplied." *Id.* at Part III, Section F, para. 8(b). Current Service RR 41:20.

[27] A protesting country must file its objection within 30 days of the receipt of supplementary information or it will be deemed to have accepted the notification. *Id.* at Part III, Section F, paras. 7(c)-(e). When it became obvious that no supplementary information would be forthcoming, the United States took the added measure of protesting the operation of HIBS, notwithstanding the Dominican Republic's failure to provide proper notice. Letter dated March 31, 1977 from the Chief of the Broadcast Bureau to the Director General of Telecommunications, Dominican Republic. Bureau's October 7, 1981 Response, Attachment 4.

[28] The 1200 kHz frequency is a designated United States Class I-A clear channel station under NARBA.

[29] Bureau Response, Attachment 2. This engineering report, dated August 11, 1976

is penetrating the border of the continental United States in violation of NARBA. For notification to be valid, the new broadcast station must be in accordance with the Agreement.[31]

13. Looking at the first two questions we thus reach the conclusion that HIBS is operating in violation of NARBA, that under NARBA HIBS is therefore not entitled to protection against interference from the Lares proposal, and that the Lares application can be granted. In sum, the Dominican Republic has failed to supply supplementary information needed to perfect its preliminary, conditional notification; it continues to broadcast a signal penetrating the border of the continental United States in contravention of NARBA; it has filed no formal objection to the valid notification of the Lares proposal; and it has not responded to the formal objection lodged by the United States on March 31, 1977.

14. Having concluded that Lares is not precluded from grant of a construction permit under NARBA, because of interference that might be caused to HIBS, two primary questions remain for consideration on this point. First, is NARBA still in effect and thus controlling? Second, if NARBA is no longer the governing treaty, can a construction permit still be granted under the new international agreement emerging from the Region 2 Administrative Conference? Previously released Commission Orders indicate that during the transition period necessary to implement the Region 2 Plan the provisions of NARBA will continue to apply to its signatories.[32] At the same time the Commission has stated its intent to conform with the procedures and protection standards contained in the Final Acts, as they pertain to interference caused to a foreign station.[33] Accordingly, an applicant such as WGDL must be able to satisfy the requirements of both international agreements. To this end we have already concluded that WGDL may be granted a construction permit under NARBA. Assuming that under the new Region 2 Agreement HIBS will be a ligitimately operating station, the question then becomes whether this change in status compels a different conclusion. In considering this question it will be helpful to review the

---

was based on the skeletal information provided by the Dominican Republic in its June 28, 1976 "notification," and shows that from the very beginning the Commission expressed concern over the deficiencies in the technical operations of HIBS.

[30] Lares' October 7, 1981 Response, Attachment B.

[31] NARBA, Part III, Section F, para. 7(b), Current Service RR 41:19.

[32] *The Administrative Conference for AM/Broadcasting in Region 2, Fourth Report (Fourth Report)*, FCC 82-93, Attachment 1 (*Report of the United States Delegation*, p.2 n.2, released March 10, 1982. See also Public Notice, FCC 82-230, released May 18, 1982, where the Commission set forth the applicable protection standards governing the respective rights between neighboring countries.

[33] *Id.* The Final Acts adopted at the Region 2 Conference comprise a Regional Agreement and its various annexes, including a Regional Plan (Annex 1) and technical criteria (Annex 2), and several Resolutions and Recommendations pertaining to post-conference procedures. *Fourth Report*, pp. 1-3.

parties' submissions concerning the degree of interference HIBS would be receiving and whether this amount is excessive under the new agreement and hence a bar to the Lares application.

15. As already noted, the Region 2 Agreement is the product of negotiations spanning the last seven years[34] and involves potentially all the countries of the Western Hemisphere.[35] Its purpose is to establish a hemisphere-wide spectrum allocation scheme for reciprocal protection of each country's AM services. One major objective of the Rio de Janeiro conference was to identify those radio stations receiving or causing no objectionable interference. Two lists of stations were prepared. Those stations placed on List A were purportedly receiving or causing no unacceptable interference while List B encompassed stations with interference problems. At the end of the Conference numerous interference problems between many countries remained outstanding. Mechanisms were thus set up to resolve these questions and to permit verification and correction of the lists, as modified during the course of the Conference. As of the conclusion of the Region 2 Conference, HIBS was on List A and WGDL was on List B.

16. Any significance attached to being on either List A or B must be considered, however, in light of the tentative nature of those lists. It should be noted initially that the specification of stations on List A is subject to verification and challenge. In this regard studies of daytime interference had not been conducted by the time of the Conference and thus this factor was not considered in the preparation of Lists A and B. The amount of acceptable and unacceptable interference caused and received by HIBS and WGDL has accordingly yet to be assessed.

17. Although no engineering studies of daytime interference were completed at the Region 2 Conference, unchallenged engineering studies submitted by Lares show that the interference to be received by HIBS "occurs approximately 37 miles from HIBS, near the southeastern tip of the Dominican Republic,"[36] with the total area of interference being approximately 38 square miles. Thus, while there may be some interference to the HIBS signal, under the circumstances of this case it appears insignificant and subject to modification following negotiations between the two countries. If this minimal amount of interference is in fact considered objectionable by the Dominican Republic, that country can seek recourse under the Region 2 Agreement to resolve any problems.[37] To date,

---

[34] Planning for the Region 2 Conference was begun in November 1975 by the Inter-American Telecommunications Conference (CITEL), which is responsible for coordinating inter-American telecommunications matters.

[35] Region 2 countries consist of those found in North, Central and South America, the Caribbean, Greenland, Hawaii and various small islands in the Atlantic and Pacific Oceans. *Fourth Report*, Attachment 1, p.2 n.2.

[36] Response of Lares Broadcast Corporation, Appendix 1, p.2, filed June 29, 1982.

the Dominican Republic has raised no formal objection to the potential operation of WGDL. We therefore conclude that grant of the Lares application is not precluded by the new Region 2 Agreement under the circumstances reflected here.[38] Moreover, since this agreement does not govern the question of the amount of overlap that can be received by WGDL, a question left to our domestic rules, the new agreement does not stand as an impediment to a grant of the Lares application.

18. We turn now to the question of whether the Lares station would receive excessive interference from HIBS under our Rule 73.37(b)(2) and, if so, whether that rule should be waived. In view of our responsibility to promote the most efficient use of the broadcast spectrum available to the United States, it would ordinarily be important that we determine, prior to authorization, the degree of interference which will be received by a proposed service. However, unless a construction permit is first granted we may never reach this question under the unique situation presented here.

19. Under the circumstances of this case it would be unreasonable to expect the government of the Dominican Republic to enter into negotiations with the United States unless its domestic radio stations were actually receiving interference from an operating United States station. At the same time it is equally unreasonable to expect the Lares applicant to bear the expense and trouble of constructing a radio station without a reasonable assurance that it will be granted a license to operate that station in the future. Our approach to this dilemma was to waive Section 73.37(b)(2) so that a construction permit could be granted. We recognize that this waiver was made without first determining the precise degree of signal

---

[37] If any problems should arise, we are confident they can be resolved through negotiation and, if necessary, modification of WGDL's facility. As explained in the attachment (*Report of the United States Delegation* ) to the *Fourth Report*, "resolution of incompatibilities will depend on the results of . . . negotiations." p. 32. Indeed, this has been the Commission's position since the designation order issued and the original grant was made to Lares. More specifically, in its Designation Order the Commission included the following language:

> [Any] grant is subject to acceptance of any interference that may be caused by operation of station HIBS at San Pedro de Macoris, Dominican Republic, on 1200 kHz and the technical facilities authorized herein may be modified in any manner as may be appropriate after discussion with the Dominican Republic.

[38] In passing we note that under the Region 2 Agreement WGDL was denominated operational as of January 1, 1982 and therefore does not fall under the proscription of paragraph 12 of Annex 2, Resolution COM 4/1 which provides: "A planned station in List B may be put into operation unless it causes unaccepted interference to a station which was in operation as of January 1, 1982." Final Acts of the Regional Administrative MF Broadcasting Conference (Region 2). WFBA complains that the listing was based on a fiction since WGDL is not in reality operational. However, we cannot ignore the practical effect of the unopposed listing. In view of this listing and the other factors described above, the Final Acts do not serve as a bar to our reaffirmation of the grant to Lares.

overlap. Yet, countervailing public interest benefits justified waiver. Foremost, the applicant would be providing the first aural broadcast facility licensed to Lares, Puerto Rico.[39] Secondly, protection of our rights under international treaty must override mechanical application of our domestic allocation rules. In this regard, the ability of the United States to protect its interests under international law would be seriously undermined if we were to stand idly by and allow any country to unilaterally violate governing treaty provisions.[40] Accordingly, it is imperative that this agency adopt that position most consistent with our rights under existing treaties, even though the effect is to reduce the emphasis ordinarily placed on our domestic allocation rules.[41] By the same token it appears that the preclusive effect, if any, may be greatly ameliorated following negotiations and technical modifications.[42] Thus, there appears little reason to preclude grant on the basis of a rule that Lares may hereafter be able to satisfy.

20. In conclusion we believe it would be contrary to the public interest to foreclose an otherwise qualified applicant from an opportunity to obtain a construction permit and ultimately a license because of the improper operation of a non-protesting foreign station.[43] For these reasons we feel that waiver of Section 73.37(b)(2) which presupposes that the source of interference emanates from a legitimately operating station, is warranted.[44] Having examined the situation from all relevant perspectives we again reach the conclusion that a construction permit was properly granted to Lares

---

[39] Application of Radio Lares for a construction permit for a new broadcast station in Lares, Puerto Rico, filed June 30, 1975, Exhibit 5.

[40] The United States has long ago objected to the unauthorized operation of HIBS on the 1200 kHz frequency. As we have repeatedly stated, the unlawful status of HIBS is a relevant factor, *inter alia*, for us to take into account in deciding whether a waiver of our "interference received" rule is appropriate. Similarly, as already mentioned, under NARBA the United States has a priority right to the use of 1200 kHz and the Dominican Republic has failed to comply with the notification requirements of that treaty.

[41] The existence of the new Region 2 Agreement does nothing to undermine the rationale for granting a construction permit to the Lares application because of past treaty infractions. We reached our determination on the basis of nonconformity with international treaty. Thus, although the governing treaty may have changed, the basis for our action remains valid.

[42] Intervenor Pepino previously predicted that the prohibited overlap received by Lares from HIBS might cover as much as 35% of the area and 33% of the population falling within the protected 0.5 mv/m contour of the applicant. Petition for Reconsideration or, In the Alternative, Petition for Leave to Intervene, filed December 4, 1976, Engineering Statement, p. 4.

[43] *Cf. Newcastle Broadcasting Corp.*, 1 FCC 2d 1124 (1965), *rev'd. on other grounds*, 11 FCC 2d 523 (1968).

[44] Compare *Arroyo Broadcasting, Inc.*, 49 FCC 2d 578 (1974), where waiver was denied when the originator of the interference was not a NARBA signatory; and *Golden Gate Corp. (WHIM)*, 6 FCC 2d 825 (1967), where waiver was denied in the absence of sound public interest justification.

Broadcasting Corporation and that the Commission's action remains fully viable.

21. ACCORDINGLY, IT IS ORDERED, That the previous determination in this proceeding granting the application of Lares Broadcasting Corporation for a construction permit for a new commercial standard broadcast station to operate on the 1200 kHz frequency at Lares, Puerto Rico, IS REAFFIRMED.

22. IT IS FURTHER ORDERED, That the Petition for Substitution filed April 1, 1982 by Gloria Mendez vda. de Perez IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Specialized Services
Inquiry by FCC
Wide Area Telephone Services (WATS)

Rules adopted for computation and assessment of end user and carrier's carrier access charges and the creation of an exchange carrier association to prepare access charge tariffs and distribute pooled access charge revenues.
*-MTS/WATS Market Structure*
CC Docket No. 78–72

FCC 83–252

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In the Matter of | |
| MTS and WATS Market Structure | CC Docket No. 78–72, Phase I |

SUPPLEMENTAL ORDER

(Adopted May 26, 1983 Released: May 31, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING; COMMISSIONER JONES DISSENTING AND ISSUING A STATEMENT; COMMISSIONER SHARP ABSENT.

1. In the *Third Report and Order* in this docket, FCC 82–579, released February 28, 1983, we established a system of access charges through which telephone companies will after January 1, 1984, receive compensation for the use of their facilities to complete interstate and foreign telecommunications. Recognizing that after that date AT&T should no longer perform its traditional role of tariff filing agent and administrator of revenue pools associated with interstate services provided by local carriers, we also mandated the creation of an exchange carrier association to assume the task of preparing and filing access charge tariffs and administering the revenue pools created by these tariffs. We concluded that membership in the association would be limited to telephone companies participating in the access charge revenue pools and that the association's governing board should be composed exclusively of representatives from these companies. In order to assure appropriate representation for different classes of carriers, we decided that a rule defining the board's membership was needed. We recognized, however, that we could not appropriately prescribe a rule to achieve

this result until we knew which carriers would choose to participate at least during 1984 in the voluntary common tariff arrangements permitted by the *Access Charge Order.*[1] With that information available, we are now prepared to prescribe the rule that will define the composition of the association's board of directors. We also take this opportunity to prescribe the steps that must be taken to elect the association's first board of directors and to perform other preliminary organizational activities.

I. *The Structure of the Association's Board of Directors*

2. In the *Third Report and Order* we established two groups of access elements for which exchange carriers might enter into a voluntary common tariff arrangement with associated voluntary revenue pools. The first group comprised the three access elements charged to end users: dedicated access line; pay telephone and end user common line, while the second included the "traffic sensitive" access elements charged to interexchange carriers: line termination; local switching; intercept; information; operator assistance; common transport; dedicated transport; special access; and billing and collection. In addition we required all exchange carriers to enter into a mandatory common tariff arrangement and revenue pool in order to recover certain non traffic sensitive costs.

3. We created the exchange carrier association to prepare and file these tariffs and to administer and distribute the three associated revenue pools. Recognizing that there was insufficient time for the association to prepare the initial access service tariffs, which must be filed by October 3, 1983, we ordered AT&T to prepare and file these tariffs. As the first step in this process, we required all exchange carriers to notify AT&T by April 9, 1983, of their decision to file tariffs separate from the association tariffs for 1984. We also required that AT&T provide periodic progress reports to us until it files the initial tariffs.

4. On April 25, 1983, AT&T filed its first progress report. That report indicated that 1202 independent telephone companies had chosen to join both voluntary pools created in the *Access Charge Order*, 47 independents and 10 Bell Operating Companies (BOCs) chose to join only the voluntary pool for carrier traffic sensitive access charges, while four independent telephone companies chose to join only the voluntary pool related to end user access charges. The remaining carriers that responded to the letter, 11 BOCs and 83 independent telephone companies, plan to file separate tariffs for all voluntary elements.

[1] At that time we expressed our intent to issue the rule without soliciting additional comment since we had already sought and received comment on the structure of the association's governing board in response to our Fourth Supplemental Notice of Inquiry and Proposed Rulemaking in this docket, 90 FCC 2d 135 (1982) ("Fourth Supplemental Notice"). See *Access Charge Order* at n. 117.

5. With this information we believe that we can now act to define the membership of the association's governing board so that the board's composition initially reflects and over time continues to reflect the relative interest of different classes of carriers in the association's tariff-related activities. Accordingly, we now prescribe the following rule to define the composition of the exchange carrier association's board of directors:

69.602. Board of directors.

(a) For purposes of this section, the association membership shall be divided into three subsets:

(1) The first subset shall consist of all the Bell System Operating Companies other than Cincinnati Bell Inc. and Southern New England Telephone Company;

(2) The second subset shall consist of all other telephone companies with annual operating revenues in excess of forty million dollars;

(3) The third subset shall consist of all other telephone companies.

All commonly controlled companies shall be deemed to be one company for purposes of this section.

(b) There shall be fifteen directors of the association.

(c) In 1984 and 1985, five directors shall represent the first subset, three directors shall represent the second subset and seven directors shall represent the third subset.

(d) In 1986 and 1987, four directors shall represent the first subset, three directors shall represent the second subset and eight directors shall represent the third subset.

(e) In 1988 and thereafter, six directors shall represent the first and the second subset jointly and nine directors shall represent the third subset.

(f) Each subset shall select the directors who will represent it through an annual election in which each member of the subset shall be entitled to vote for the number of directors that will represent such members subset.

(g) For each access element or group of access elements for which voluntary pooling is permitted, there shall be a committee composed only of directors from companies participating in the pooling for that element or group of access elements. Each such committee shall be responsible for the preparation of charges for the associated access elements that comply with all applicable sections of this Part.

(h) Directors shall serve for a term of one year commencing January 1 except that the initial directors shall serve from the time of election until December 3, 1984.

6. We had first raised the issue of the board's composition in the *Fourth Supplemental Notice*. In its comments responding to that *Notice*, the Rural Telephone Coalition (RTC) had presented a detailed proposal for the governing board's structure. *See* RTC's Comments at pp. 52–56. The rule we now adopt incorporates several features of that proposal and, insofar as that rule departs from RTC's plan, we believe that the board members selected in accordance with

the rule's requirements will more accurately reflect and will be more responsive to the concerns of the companies they represent. For example, the rule we adopt today creates categories of exchange carriers based upon annual operating revenue rather than number of telephones because, as deregulation of customer premises equipment continues, the ability of a local telephone company to know the number of telephones in its system will diminish. We believe that because there is a correlation between the number of lines a carrier provides and its operating revenues, the latter is an equally reasonable basis for categorizing carriers as "large" or "small." The rule also creates fewer classes of carriers than the RTC proposal. The rule recognizes, however, that while in 1984 and 1985 the larger companies will rely upon the mandatory revenue pool to recover a substantial part of their non-traffic sensitive costs, over time because the share they will recover through the pool will drop significantly, their relative interest in the association's tariffing activities will diminish in comparison to the interest of smaller companies generally, and those with high costs particularly. The rule accomplishes this by gradually reducing the representation of the larger carriers and concomitantly increasing the representation of the smaller carriers on the board. The rule also recognizes that the telephone companies choosing to enter the common tariff arrangements for the end user or the traffic sensitive access element groups share a common interest in the rate structure of the association's tariff for these elements, and that this interest is not necessarily based on a carrier's size. Accordingly the rule assigns responsibility for developing the charges for each of these groups to a committee whose membership is restricted to board members whose companies have chosen to join the common tariff to be filed for that group of elements.

7. We recognize that future developments that cannot be predicted with certainty at this time may require adjustments in the 1986–1987 or the 1988 and after formula and expect to institute proceedings at an appropriate time to consider revisions. We may also elect to designate separate representation for carriers that do or do not receive Universal Service Fund distributions at a later date. It would not be feasible to create such categories at this time because we do not have sufficient information to devise a suitable formula and this Commission has not yet received the Joint Board's Recommendations in CC Docket No. 80–286.

## II. *Election of the First Board of Directors and Other Organizational Activities*

8. Once the exchange carrier association is organized, the association will conduct annual elections to select board members in accordance with the rule we adopt today. Because it will be the 1984 board members who, in fact, organize the association, the association

itself clearly cannot conduct the election of this first governing board.

9. We have been advised that USITA, the Bell Operating Companies and the Rural Telephone Coalition have formed an industry committee to advise AT&T on the development of the exchange carrier association's initial tariffs and to perform steps preliminary to the association's organization. In particular, the committee has offered to conduct and supervise the election of the association's first board of directors. The letter, dated May 9, 1983, in which the committee makes this offer is attached as an appendix to this *Order*. The alternatives to having the committee conduct the election are to order AT&T to hold the elections or for the Commission itself to conduct the election. Neither of these alternatives is preferable to having the committee conduct the election. The committee already represents the interests of all segments of the telephone industry and has the resources at its disposal to undertake this formidable task. We shall therefore authorize and direct this industry committee to conduct the election of the association's 1984 board of directors. This election should be held as soon as possible in order to create a board that can provide some policy guidance in the formulation of the initial tariffs.

10. In the election process, each carrier shall be entitled to vote for the number of directors allotted to its subset. For example, a carrier that had revenues in excess of forty million dollars in 1982 and that is not a divested BOC may vote for three different persons as association directors. Such a carrier could not cast more than one vote for any one candidate.

11. In its May 9 letter the industry committee also states that it will be necessary to perform other activities of the type described in that letter at this time. The creation of a functioning organization that will be able to perform all association functions on January 1 is, of course, essential to the success of the access charge plan. It is also desirable that representatives of independent telephone companies provide advice to AT&T in the early development of the initial access charge tariffs. In view of the time that will be required to elect the initial directors, we have concluded that the industry committee should also be authorized and directed to perform the type of activities described in the May 9 letter until the initial board of directors has been elected.

## III. *Ordering Clause*

12. Accordingly, IT IS HEREBY ORDERED, That pursuant to 47 U.S.C. §§154(i) and (j) and 203, Section 69.602 IS ADDED to Part 69 of the Rules of this Commission as set forth in this Order, effective on the date following publication in the *Federal Register*.

13. IT IS FURTHER ORDERED That the industry committee described in the Appendix to this Supplemental Order is authorized

and directed to conduct an election to select the initial association directors and to perform other association activities of the type described in such Appendix until the initial directors have been elected.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

May 9, 1983

Mr. Gary M. Epstein, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Mr. Epstein:

Part 69, Subpart G of the FCC's Rules (adopted December 22, 1982) mandates the creation of an Exchange Carrier Association (ECA). This association will prepare and file access charge tariffs, as well as collect and distribute related revenues, on behalf of all telephone companies that participate in the Association. This letter is intended to inform the Commission of industry activities in this regard, as well as to seek counsel and/or action on matters of concern to the industry.

The Commission noted that the task of preparing and filing complex ECA access charge tariffs is formidable, particularly since such tariffs must be acceptable to all industry participants and at the same time be in compliance with the Commission's Rules. The Commission recognized that the ECA could not be created in sufficient time to prepare the initial common access charge tariffs, and accordingly required AT&T to file such tariffs on behalf of the telephone industry and report its activities in connection with access tariff preparations (paragraphs 371 and 372, FCC Third Report and Order, CC Docket No. 78–72). The FCC rendered findings that a "common tariff arrangement that most of the exchange carriers can use is clearly necessary to make any access charge rules work" and that "such arrangements would, therefore, presumably be immune from anti-trust sanctions because they are necessary to make the regulatory scheme work—" (pp. 95–96). It necessarily follows that once the ECA is established, its activities pursuant to the FCC's order would be immune from anti-trust sanctions.

If the Commission's access charge plan is to be fully functioning beginning on January 1, 1984, a significant amount of work must be done in 1983 in addition to the initial development and filing of tariffs. An ECA organizational structure must be developed and the work functions, job descriptions and personnel skill requirements specified. All of the operational plans and data systems necessary to administer tariffs and collect and disburse revenues associated with each of the access charge pools must be designed and tested, and contracts governing the relationship between the ECA and each member company have to be developed and consummated. These pool administration methods, to the greatest extent possible, should be developed by the same people who will have to make them work in 1984. Staffing policies have to be created and implemented, and the people possessing requisite skills must be identified and recruited. Office space, equipment, and furniture has to be procured. Questions which relate to people's personal lives such as work location, salary schedules, pensions and other benefits all must be resolved. Legal questions concerning issues like incorporation, tax status and insurance must be also addressed.

It is clear that if the ECA is to be operational by January 1, 1984, work on these

preparatory activities cannot be delayed—in fact some initiatives in this regard have been taken by the industry and work has begun. Specifically, pending the Commission's supplemental order, the telephone industry has established an ECA Ad Hoc Committee (see attached list of members) to provide advice and support to AT&T's data collection and tariff development activities, as well as to begin the many administrative and operational activities essential to the creation of the ECA.

The members of the ECA Ad Hoc Committee believe that all of their activities have been in support of the tasks that the Commission has mandated for AT&T and the ECA. In addition, the Committee stands ready to provide the Commission with any assistance it may request in the formation of the ECA or its Board of Advisors. However, recognizing the Commission's admonition at Paragraph 344 the Ad Hoc Committee will not engage, "in activities that are not directly related to the preparation of access charge tariffs or the distribution of access charge revenues unless such additional activities are expressly authorized by . . . [the] Commission."

We would be happy to discuss the nature of our activities further, or answer any questions you may have. However, because of the urgent need to move forward with the preparatory activities we have described above we will assume that our course of action has your concurrence unless we hear otherwise.

A. Gray Collins, Jr.
Vice President - Access Tariffs
Central Services Organization:
On Behalf of the ECA
Ad Hoc Committee

*Attachment*

*ECA Ad Hoc Committee Members*

Representation from the USITA Member Companies:

J. Naset: General Telephone and Electronics Corp.

B. J. Boritzki: United Telephone Systems, Inc.

W. B. French: Shenandoah Telephone Co.

Representing the Rural Coalition (NTCA, OPASTCO, NREATA):

D. Cosson: NTCA

E. Copsey: Fidelity Telephone Co.

Representation from the Regional Bell Operating Companies:

T. R. Glenn: Midwest and Far West Regions

B. W. Baldwin: Northeast and Mid-Atlantic Regions

C. Perkins, Jr.: Southeast and US West Regions

R. A. Harris: Southwest Region

Dissenting Statement
of
Commissioner Anne P. Jones

*In Re*: In the Matter of MTS and WATS Market Structure, CC Docket No. 78–72, Phase I (Exchange Carrier Association)

An essential component of the Commission's access charge plan adopted in the *Third Report and Order* in this docket last December was the Exchange Carrier Association (ECA). In effect, the ECA will replace the traditional industry mechanism of settlements and division of revenues administered by AT&T. In many respects, the ECA replicates in form and function the existing mechanism for pooling and distributing industry revenues among local exchange carriers. So long as rate averaging and arbitrary jurisdictional cost allocation remain attributes of the structure of the telephone industry, some mechanism for revenue pooling is necessary.

My objection to the ECA, both in December and now, is that such an organization is both inconsistent with and inimical to the development of a competitive telecommunications industry. As I said last December, "I object to the creation of the ECA and question the Commission's authority to mandate the existence of such an organization. As a matter of public policy, the ECA is unnecessary since pooling is unnecessary. . . . I fear, however, that the ECA organization contemplated by the Commission's [access charge plan] will prove a hazard to telecommunications competition."[1] My views on the ECA in December are unchanged today, and as a matter of policy and principle I cannot support the *Supplemental Order* presently before the Commission that defines the composition of the ECA's board of directors.

The existing industry settlements and division of revenue process and its successor, the ECA, are institutions consistent with a closed-entry, regulated monopoly industry. They are inherently mechanisms for industry cooperation and potential collusion, not vigorous competition. I think the Commission should realize that regulatory policy that attempts to preserve traditional industry practices may seriously impede the ongoing evolution of a telecommunications industry that is destined to be competitive. In a sense, the creation of the ECA reflects a certain hesitancy by the Commission to accept the full implications and consequences of its pro-competitive policies. The day is long past, however, for the Commission to second-guess the wisdom of its pro-competitive decisions. I am confident that competition is the proper foundation of our policies toward the

[1] Separate Statement of Commissioner Anne P. Jones Concurring and Dissenting in Part *In Re*: MTS and WATS Market Structure, CC Docket 78–72, Phase I, April 4, 1983, pp. 42–43.

telephone industry. Thus, the Commission should move ahead with its pro-competitive agenda, not linger over the past.

In my view, the ECA is a vestige of the past and an impediment to the future. I can support neither the ECA in concept nor rules governing its organization. Therefore, I respectfully dissent from the Commission's decision to adopt rules for the establishment and management of the ECA.

CATV Carriage, Significant Viewing Test
Declaratory Ruling

Granted in part request of television broadcast station to be declared significantly viewed. Station met test levels in seven counties in 1976, but no longer meets levels in one county today. *–Octagon B/cing Co.*

FCC 83–308

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re: | |
| OCTAGON BROADCASTING COMPANY | CSR-2209 |
| Petition for Special Relief | |

MEMORANDUM OPINION AND ORDER

(Adopted: June 29, 1983 Released: July 19, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. On September 13, 1982, Octagon Broadcasting Company (hereinafter "WMBB"), licensee of Television Broadcast Station WMBB (ABC, Channel 13), Panama City, Florida, filed a "Petition for Declaratory Ruling" seeking to be declared significantly viewed in the following counties: Dale, Geneva, and Houston, Alabama; Gadsden, Jackson, and Leon, Florida; and Decatur, Georgia. WMBB's petition is opposed by Allen Communications, Inc. (hereinafter "WECA"), licensee of Television Broadcast Station WECA (ABC, Channel 27), Tallahassee, Florida, and by Southeast Alabama Broadcasting Company, Inc. (hereinafter "WDHN"), licensee of Television Broadcast Station WDHN (ABC, Channel 18), Dothan, Alabama. WMBB has replied.

2. In support of its petition, WMBB states that it became operational (as Television Broadcast Station WDTB) on October 4, 1973, which was after the surveys used to establish the Commission's list of significantly viewed signals in the *Reconsideration of the Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 326, 378–463 app. B (1972). Accordingly, pursuant to Section 76.54(d) of the Commission's Rules, WMBB may utilize county-wide data to establish its status as significantly viewed, provided that such data is from the station's first three years of operations. WMBB submits Arbitron data from 1976, which reveals that WMBB achieved the following levels of viewing:

| *County* | *Total County Share of Viewing* | *Total Net Weekly Circulation* |
|---|---|---|
| Dale, AL | 4% | 35% |
| Geneva, AL | 7% | 58% |
| Houstan, AL | 10% | 56% |
| Gadsden, FL | 15% | 76% |
| Jackson, FL | 19% | 84% |
| Leon, FL | 14% | 56% |
| Decatur, GA | 6% | 37% |

Section 76.5(k) of the Rules defines a significantly viewed network affiliate as one which achieves in noncable households "a share of viewing hours of at least 3 percent (total week hours), and a net weekly circulation of at least 25 percent. . . ." Based on the above data, WMBB seeks to be declared significantly viewed in the referenced counties.

3. WECA opposed WMBB's petition on November 12, 1982, and supplemented this opposition on November 16, 1982.[1] WECA argues that Panama City, WMBB's city of license, is a separate market from both Tallahassee, Florida,[2] and Dothan, Alabama, yet WMBB seeks to require its carriage on cable systems in those latter markets. In addition, notes WECA, WMBB would be entitled, as a significantly viewed signal, to receive "full, undeleted carriage of all its programming, network and non-network," even though WECA currently receives network program nonduplication protection on cable systems in the affected counties. WECA contends that this protection is particularly vital for its survival in Tallahassee, whose cable system serves approximately 30,000 subscribers, which constitute about 20 percent of the homes in the Tallahassee Area of Dominant Influence (ADI). WECA contends that its local competitor, Station WCTV (CBS, Channel 6), Tallahassee, Florida, does not suffer from network program duplications. WECA asserts that it "has never made an operating profit in its six years of operation," and that WMBB seeks to create "an unnatural competitive situation. . . ." WECA states that in 1980–1981 it endured duplication of its network programs on the Tallahassee cable system, when Station WJHG-TV (NBC, Channel 7), Panama City, Florida, was an ABC affiliate. During this period, argues WECA, the station suffered a revenue loss, and also lost at least four advertisers to WCTV, whose programming was not duplicated. WECA maintains that marketplace forces — which are defied by the significant viewing rules — should be allowed to work undisturbed, and that the public would lose much and gain nothing from granting WMBB significantly viewed status.

4. WECA states that, while WMBB's data is technically in

[1] WMBB did not serve its petition on parties until October 13, 1982.

[2] WECA notes that Panama City is 85 air miles from Tallahassee, and over 100 miles distant by available highways.

compliance with Section 76.54(d) of the Rules, WECA was not on the air at the time of WMBB's survey data, nor was WMBB itself on the air when the Tallahassee system gained most of its current subscribership level. WECA estimates that it will lose 5 to 10 percent of its gross revenues if WMBB's petition is granted, and states that WECA has been able to hold its annual expense increases to between 4 and 6 percent for the past three years. WECA projects that its losses would force it: (1) to fire two persons hired to work on its daily public affairs show "A. M. Tallahassee," and perhaps to drop the program entirely; (2) to fire two persons doing general production work; and (3) to fire two or three members of the news staff and to restrict news coverage to metropolitan Tallahassee. Citing *KDUB-TV, Inc.* (Dubuque, Iowa), FCC 81–530, 88 FCC 2d 450 (1981), *recon. denied*, FCC 82–182, 89 FCC 2d 994 (1982), and *Desert Empire Television Corporation*, FCC 82–471, 52 RR 2d 798 (1982), WECA claims that it is entitled to retain nonduplication protection, and that pending rulemakings and legislative proposals should be resolved prior to ruling on WMBB's petition.

5. WDHN opposed WMBB's petition on November 12, 1982. WDHN contends that WMBB's data is out-of-date and unreliable, because of WMBB's 1982 affiliation change from NBC to ABC, and because of population shifts in the affected counties. WDHN submits the following population data:

| *County* | *1970 Population* | *1980 Population* | *% Change* |
|---|---|---|---|
| Dale, AL | 52,995 | 47,821 | −9.8 |
| Geneva, AL | 21,924 | 24,293 | +10.6 |
| Houston, AL | 56,574 | 74,632 | +31.9 |
| Gadsden, FL | 39,184 | 41,565 | +6.1 |
| Jackson, FL | 34,434 | 39,154 | +13.7 |
| Leon, FL | 103,047 | 148,655 | +44.3 |
| Decatur, GA | 22,310 | 25,495 | +14.3 |

Citing the *Report and Order in Docket No. 20371*, FCC 75–1145, 56 FCC 2d 265, 269 (1975), WDHN contends that WMBB's data is unreasonably out-of-date and is no longer reliable.

6. WMBB replied to WECA and WDHN on December 2, 1982. WMBB contends that WECA's arguments merely echo those made by the station in the "Petition for Rulemaking" (RM-3745) filed in 1980 by the Smaller Market UHF Television Stations Group, to which WECA belongs, and are irrelevant to WMBB's demonstrated viewership levels. Citing the *Memorandum Opinion and Order in Docket No. 19995*, FCC 78–217, 67 FCC 2d 1303 (1978), *recon. denied*, FCC 78–597, 68 FCC 2d 1461 (1978), *aff'd sub nom. Spartan Radiocasting Company v. FCC*, 619 F.2d 314 (4th Cir. 1980), WMBB argues that significantly viewed signals are local signals, and that the nonduplication rules are not designed to protect network affiliates from competition from stations affiliated with other networks. WMBB notes that WECA concedes that WMBB's data

meets the Commission's requirements, and argues that its levels of viewing are in part due to Tallahassee viewers. WMBB notes that *Docket No. 20371, supra*, mandates the use of data from a station's first three years of operations, and that this data has been publicly available for years. WMBB denies that it must make a showing that its petition is in the public interest, because a significantly viewed signal is in fact a local signal, citing the *Cable Television Report and Order*, FCC 72–108, 36 FCC 2d 143 (1972). WMBB argues that WECA's opposition contains none of the factual evidence required by *KDUB-TV, Inc., supra*, and maintains that pending administrative and legislative proposals should not deter action on the instant petition.[3]

7. In order to be declared a significantly viewed signal in a particular county, WMBB must have achieved, during the first three years of its operation (*i.e.*, between October 1973 and October 1976), at least a 3 percent share of total week viewing hours and at least a 25 percent net weekly circulation. According to the data submitted, WMBB did so in each of the counties in question. The concerns raised by WDHN concerning population shifts do not affect this conclusion. WMBB must achieve a percentage of viewing, which ordinarily will not be affected by changes in total population. With regard to WDHN's allegations concerning the effect of WMBB's affiliation change, we note that the criteria for significant viewing status which the station must meet are sufficiently low to represent the signal's availability rather than its popularity. Additionally, the three major networks nationwide generally achieve similar viewing levels, and in fact WMBB remains significantly viewed in most cases (*see*note 4, *infra*.) WECA's concerns based upon Panama City's distance from Tallahassee are equally unavailing. If WMBB's signal is available beyond its city of license at the required level of viewing, it is therefore significantly viewed. To rule otherwise would be disruptive of the competitive marketplace forces WECA argues are at stake in this case. Nor does WECA offer any factual data to substantiate its hypothesized financial difficulties should WMBB's petition be granted. While WECA notes that it once before experienced a loss of non-duplication protection vis-a-vis a competing affiliate of the same network, WECA does not submit the detailed audience and financial analysis that led the Commission to grant

[3] In addition, WECA filed an unauthorized and untimely pleading on June 28, 1983, one day prior to this item's consideration, reiterating its earlier argument (*see*paragraph 4, *supra*) that action on the instant petition be deferred, citing in addition *KCST-TV, Inc. v. FCC*, 699 F.2d 1185 (D.C. Cir. 1983), and also noting the pendency of the July 1983 audience ratings period. WMBB opposed WECA's filing that same day. WECA offers no justification for the filing of its unauthorized pleading, nor explains why it could not have filed its pleading earlier. Furthermore, in view of our analysis herein (*see*paragraph 8, *intra*), we see no reason to postpone action today based on the pendency of future surveys. Consequently, WECA's request will be denied.

relief in both *KDUB-TV, Inc., supra,* and *Desert Empire Television Corporation, supra.* Barring a showing of need for regulatory intervention, we see no reason why a signal significantly viewed and readily available over the air should not be carried by a local cable television system.

8. At the same time, we are aware that WMBB's data is some seven years old. During these years, certain shifts in viewing levels have occurred. While these shifts have not generally affected WMBB's status as significantly viewed in six of the counties in question, in Dale County, Alabama, we note that WMBB's total county share of viewing in 1982 has dropped to 1 percent, and that WMBB's total net weekly circulation has dropped to 11 percent.[4] Accordingly, WMBB would not today be considered to be significantly viewed in Dale County, having failed to achieve the required 3 percent share and 25 percent net weekly circulation. We realize that our rules require the submission of viewing data, in WMBB's case, from within the period 1973–1976; however, in its decision in *KCST-TV, Inc. v. FCC,* 699 F.2d 1185 (D.C. Cir. 1983), the United States Court of Appeals for the District of Columbia Circuit raised issue regarding the Commission's and other parties' reliance on old data in determining the significantly viewed status of television stations. In view of this decision, we feel it appropriate at this time to defer action on WMBB's request that we declare it to be significantly viewed in Dale County, Alabama.[5] Apart from this one exception, however, we are satisfied that the data submitted shows WMBB to be significantly viewed in the other counties in question. The issue of WMBB's status in Dale County will be resolved subsequent to our issuance of a decision responding to the Court's concerns in *KCST-TV, INC. V. FCC, supra,* and the parties will be given an opportunity to file pleadings at that time.

9. In view of the foregoing, we find that grant of WMBB's petition, to the extent indicated above, is in the public interest.

---

[4] The 1982 Arbitron figures for WMBB in all affected counties are:

| *County* | *Total County Share of Viewing* | *Total Net Weekly Circulation* |
|---|---|---|
| Dale, AL | 1 | 11 |
| Geneva, AL | 4 | 47 |
| Houston, AL | 8 | 56 |
| Gadsden, FL | 10 | 79 |
| Jackson, FL | n/a* | n/a* |
| Leon, FL | 8 | 54 |
| Decatur, GA | 8 | 46 |

* Arbitron does not place cable controls in this county, and therefore no non-cable data is available.

[5] We note, therefore, that the staff is reviewing current Arbitron data in cases of this nature pending final resolution of *KCST-TV, Inc. v. FCC, supra.*

10. Accordingly, IT IS ORDERED, That the "Petition for Declaratory Ruling" filed September 13, 1982, by Octagon Broadcasting Company IS GRANTED to the extent indicated in paragraph 8, *supra*, and in all other respects is DEFERRED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Reconsideration, Petition for, Partial Grant of

Order adopted granting partial reconsideration of the Commission's Report and Order (adopted November 18, 1982) in CC Docket No. 81–343, where petitioner had shown willingness to use circuit-multiplication equipment to increase the effective capacity of its cable circuits.
–*Pacific Telecommunications*
CC Docket No. 81–343

FCC 83–270

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In the Matter of<br>Inquiry Into the Policies to Be Followed in the Authorization of Common Carrier Facilities to Meet Pacific Telecommunications Needs During the Period 1981–1995 | CC Docket No. 81–343 |

MEMORANDUM OPINION AND ORDER

(Adopted: June 2, 1983; Released: June 16, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. On December 3, 1982, we released our Report and Order in this proceeding, *Pacific Planning*, FCC 82–513, ___FCC 2d ___, 47 Fed. Reg. 57,040 (1982), in which we adopted policies and guidelines applicable to requests for authorization of submarine cable and satellite telecommunications facilities to meet needs in the Pacific Ocean region (POR) during the period 1982–1986. We now have before us a petition filed on January 3, 1983, by Hawaiian Telephone Company (HTC) seeking partial reconsideration of that order. Specifically, HTC requests reconsideration of (a) our authorization for it to acquire ownership of 60, rather than 120, voice-grade circuits in the ANZCAN North cable[1] for service between Hawaii

[1] ANZCAN is an acronym referring to the Australia/New Zealand-Canada submarine telephone cable. The ANZCAN cable is a 14 MHz facility, channelized to yield 1380 voice-grade circuits each with a nominal bandwidth of 4 KHz. The ANZCAN cable consists of two segments: ANZCAN North, linking Hawaii and Vancouver, British Columbia; and ANZCAN South, linking Australia, New Zealand, Fiji, Norfolk Island and Hawaii. The ANZCAN cable is a joint venture of the telecommunications entities of Australia, Canada, France, the Federal Republic of Germany, New Zealand, the Independent State of Papua, New Guinea, the Philippines and the United Kingdom. The ANZCAN owners will grant U.S.

and Canada, (b) our denial of authorization for it to acquire ownership of 35 circuits in the ANZCAN North cable for service between Hawaii and several points in Europe, and (c) our authorization for it to acquire ownership of 32, rather than 60, voice-grade circuits in the ANZCAN South cable for service between Australia and Hawaii. On January 18, 1983, the State of Hawaii filed an Opposition to Petition for Partial Reconsideration of HTC which supports our original decision and urges denial of HTC's requests. On January 31, 1983, HTC replied to the State of Hawaii's comments.

2. The Report and Order at issue here is the end product of the proceeding we initiated in June 1981 looking into the development of facilities construction and use guidelines for the POR for the period 1981–1995.[2] This proceeding marks our first attempt to analyze the U.S. carriers' facilities needs in the POR on a comprehensive basis. The various U.S. carriers providing service in the POR, Comsat, federal governmental entities responsible for communications matters and the State of Hawaii have been actively involved throughout the development of the comprehensive plan. These entities filed extensive comments and alternative proposed facilities plans. Further, since international communications are a cooperative venture between two or more countries, our process took cognizance of the views of the foreign entities concerned, directly or through the submissions of the U.S. participants.

3. In our Report and Order we generally found in the public interest the facilities plan proposed by the United States carriers, including the proposal to acquire a variety of permanent ownership and temporary IRU interests in circuits in the ANZCAN North and ANZCAN South cables. However, while generally approving HTC's request for circuits, we denied or modified specific requests in three particulars. First, we granted HTC authorization to acquire ownership of 60 circuits in ANZCAN North for service between Hawaii and Canada, rather than the 120 circuits HTC had requested. Second, we denied HTC authorization to acquire ownership of any circuits in ANZCAN North for service between Hawaii and various countries in Europe; HTC had requested authority for 35 such circuits. Third, we granted HTC authorization to acquire ownership of 32 circuits in ANZCAN South for service between Hawaii and Australia, rather than the 60 circuits requested.

4. With respect to the Canadian and Australian circuits, we found that HTC had shown a need for some of the requested circuits,

---

carriers full ownership in their ratable share of the circuits in which they acquire permanent interests. They will grant those carriers indefeasible right of user (IRU) in those in which they acquire temporary interests.

[2] We initiated the process with a Notice of Inquiry, 46 Fed. Reg. 31,286 (1981). That Notice was followed by a Notice of Proposed Rulemaking, 47 Fed. Reg. 21,868 (1982), which initiated the formal portion of the process leading to the adoption of the facilities plan at issue here.

but that it had not proposed to use them in the most effective way. We noted that HTC had not proposed to use circuit-multiplication equipment with either the Canadian or Australian circuits.[3] We further found that through use of such equipment HTC would be able to meet its forecasted demand to Canada with only 60 circuits and to Australia with only 32 circuits. With respect to the circuits to Europe, we found that HTC had proposed to use those circuits to route Europe-bound traffic to Canada, to transit Canada, via leased terrestrial facilities, to Canada's East Coast INTELSAT earth station at Mill Valley, and then to connect with the INTELSAT AOR (Atlantic Ocean Region) satellite. We noted that HTC had failed to justify its proposal; it argued only that such a routing is necessary to avoid a "double hop." That is, HTC argued that the only facility available to it for European service is the AOR satellite and that the only option it has to connect with that satellite is to use ANZCAN North or the U.S. domestic satellite. Because carriers seek to use only one satellite link on any given circuit, HTC argued that it is compelled to use ANZCAN North.[4]

5. We disputed HTC's claim that it has no option in routing Europe-bound traffic and noted that its proposed routing is unduly expensive. We noted that HTC could route its European traffic via a U.S. domestic satellite to an earth station in Pennsylvania and connect to circuits in the TAT-7 cable. We also found that such a routing would be more direct, involve much less transiting, and would be less costly. Finally, we noted that HTC should have no trouble obtaining TAT-7 circuits since, in authorizing AT&T to construct the TAT-7 cable, we required AT&T to make circuits available to other U.S. carriers such as HTC. HTC now asks us to reconsider the above three actions.

6. *Service to Canada.* Turning first to the Canadian circuits, HTC asks us to reconsider our denial of the second 60 circuits and our requirement that it use circuit-multiplication equipment with the 60 circuits we did authorize. In support HTC notes that the Master Loading Plan it had submitted with its modified circuit requests is in need of clarification. That plan, at Table Number 21, shows a need for a total of 411 circuits to Canada by 1995, 160 to be provided over ANZCAN North and 251 via satellite. *See* HTC, Master Loading

[3] Circuit multiplication refers to the process by which the effective capacity of cable facilities can be increased by as much as a factor of two. Circuit-multiplication equipment exploits the fact that one party to a telephone conversation is usually silent while the other speaks, and that speakers often hesitate. The equipment senses these silences and routes portions of other calls over the momentarily idle circuits.

[4] Because satellites are located 22,300 miles above the earth, signals must travel a longer distance than they do on terrestrial facilities. This extra length of travel means that a satellite circuit has a slightly greater delay than terrestrial circuits. As a result, whenever possible, carriers seek to use only one satellite link in a given transmission.

Plan, attached to its Comments in CC Docket No. 81–343, June 28, 1982. HTC notes, however, that its Master Plan shows a need for 160 circuits in ANZCAN North, or 40 more than the 120 circuits it had requested, but that it does not make clear how HTC proposes to acquire the remaining 40 circuits. HTC asserts that under the Master Plan the 120 requested circuits will be exhausted by 1989 and will be supplemented through use of circuit multiplication equipment or by reconfiguring the ANZCAN North cable to increase its capacity by changing the bearer circuits from 4 KHz in width to 3 KHz in width. HTC states that it regrets this lack of clarity, since it appears to have misled us into believing that its needs could be satisfied with only 60 circuits.

7. HTC also noted that its correspondent for the circuits in question, Trans-Canada Telephone System (TCTS),[5] is concerned about our failure to approve all 120 circuits requested. HTC indicates that TCTS believes our action will have an adverse impact upon TCTS's investment in the ANZCAN cable. HTC also notes that TCTS has "expressed an unwillingness to consider use of [circuit-multiplication equipment] at the outset" of its use of ANZCAN North. HTC Petition for Reconsideration at p. 4. Finally, HTC notes that it does not operate directly with Canada and that the opening of such direct service is tied to the introduction of the ANZCAN cable. HTC states that it is concerned that our denial of the 60 circuits will jeopardize the introduction of direct service. HTC requests that, since this Commission is on record as favoring direct service, we reconsider our denial of the second 60 circuits to Canada. In return, HTC has revised its Master Loading Plan for Hawaii-Canada to show that circuit-multiplication equipment (more specifically TASI[6]) will be introduced in 1990.

8. *Service to Europe.* The second area in which HTC seeks reconsideration is our denial of the 35 half circuits it requested in ANZCAN North for service to Europe. HTC argues that our denial will seriously disrupt the correspondent relationships on which its ability to provide service depends. HTC notes our concern about the cost effectiveness of routing Europe-bound traffic through Canada and the INTELSAT satellite, and agrees that our alternative proposal routing European traffic through a U.S. domestic satellite and TAT-7 would be more direct, but states that such a routing would not be acceptable to its correspondents. HTC notes that its correspondents have made investments in ANZCAN North based on HTC's proposal to use the 35 circuits for service to Europe and that

[5] TCTS is an association composed of a number of Canadian telephone carriers plus Telesat Canada, the Canadian domestic satellite carrier.

[6] TASI is a specific type of circuit-multiplication equipment which can be used to achieve a multiplication factor of 2. TASI is an acronynm standing for Time Assignment Speech Interpolation.

those circuits would go unused if HTC were to reconfigure its network as the Commission has proposed. HTC further notes that, notwithstanding our power to order AT&T to sell HTC TAT-7 circuits, some of its European correspondents "may not" have TAT-7[7] circuits available for service with Hawaii. Finally, HTC notes that its correspondents are "upset" by our "abrupt and unilateral reconfiguration of agreed upon facilities usage." HTC Petition at 7. HTC includes with its petition telexes from its German and United Kingdom correspondents indicating their support for HTC's original proposal.

9. *Service to Australia.* Finally, HTC seeks reconsideration of our decision to authorize it only 32 circuits (instead of 60) in the ANZCAN South cable for service to Australia and our requirement that HTC use circuit-multiplication equipment on those circuits we did authorize. Again HTC notes our concern about the cost effectiveness of its circuit request, but states that its Australian correspondent, the Overseas Telecommunications Commission (OTC), refuses "to consider use of [circuit-multiplication equipment] on ANZCAN South because of the additional investment that would be required." HTC Petition at 8. HTC charcterizes this position as "understandable," since it notes that OTC has made substantial investments in "cable circuits which are now spare." HTC states that the 32 circuits we authorized are enough for its current Australia service needs, but notes that future needs will be placed in serious jeopardy, since it cannot guarantee that cable circuits will then be available to it at reasonable cost.

10. *Opposition of the State of Hawaii.* The State of Hawaii generally supports the decision in our Report and Order to limit HTC's acquisition of circuits in ANZCAN North and South and states that it believes HTC has shown nothing new which would justify changing that decision. The State of Hawaii notes that, as the representative of the users within its boundaries, it is legitimately concerned that HTC use its facilities in the most efficient way. The state also argues that such users are disserved by non-essential and non-cost-effective facilities investments.

11. With respect to HTC's proposed Canada service, the State of Hawaii notes that HTC does not dispute the finding in our Report and Order that its proposal to use 120 circuits is not the most efficient use. The State notes that even HTC's latest Master Loading Plan shows less than optimal use of TASI.[8] Further, the State argues

[7] TAT-7, the seventh transalantic telephone cable, connects the United States and the United Kingdom. It is scheduled to enter service on July 1, 1983.

[8] The State of Hawaii refers here to the proposed, revised Table No. 21 HTC submitted with its Petition for Partial Reconsideration. The details of that revised plan are set out in footnote 11, *infra.* In brief, revised Table 21 shows introduction of TASI on HTC's ANZCAN North circuits in 1990.

that, since HTC has not yet been authorized to serve Canada directly, the public has not had a chance to examine the cost effectiveness of any direct service to Canada at all. The State argues that such a determination can only be made at such time as HTC files an application under Section 214 of the Communication Act, 47 U.S.C. §214 (1976), and that the existing record is certainly inadequate. The State of Hawaii also notes that the agreement with TCTS on which HTC seeks to rely was entered into before HTC had presented its proposal to the Commission for review, and before it has been authorized to serve Canada, and is therefore of no decisional value.

12. With respect to European service, the State of Hawaii indicates agreement with our tentative preference for routing such traffic through a U.S. domestic satellite and TAT-7. The State further notes that HTC does not dispute our finding, and even concedes in its Petition for Partial Reconsideration that such a routing "would result in a more direct, presumably more efficient configuration." HTC Petition at p. 7. Again, the State of Hawaii notes that HTC has not yet sought authorization to serve any European points directly and that as a result the public has had no opportunity to comment on the cost of such direct service. Finally, with respect to the Australian circuits, the State of Hawaii argues that the purported unwillingness of the Australian entity to make efficient use of its cable investment should have no decisional importance before the Commission. The state of Hawaii also argues that, should it happen that the 32 circuits we authorized would at some future date be insufficient to handle all of HTC's peak traffic to Australia, HTC does not need to handle all its peak traffic over its own direct circuits, but that it can use alternate routings which assure full and efficient use of circuitry.

## DISCUSSION

13. After reviewing the relevant portion of our December 3 Report and Order, HTC's petition, the State of Hawaii's comments and HTC's reply, we have decided to grant HTC partial relief. With respect to its request for 120 circuits for service to Canada, we note that HTC has now proposed to use circuit-multiplication equipment. We, therefore, shall grant HTC authority to acquire permanent interests in all 120 circuits in ANZCAN North which it had requested. With respect to the other aspects of HTC's petition, the circuits in ANZCAN North for service to Europe and in ANZCAN South for service to Australia, we find HTC has shown no reason to suggest that the analysis in our December 3 Report and Order was in error. Accordingly, we shall affirm our prior holding with respect to those circuits.

14. *Service to Canada (ANZCAN North).* Turning first to the matter of the 120 circuits in ANZCAN North for service to Canada,

we note that HTC does not challenge the analysis in our Report and Order that was based on data that it had provided prior to the Report and Order, referred to here as its June 28 comments. Rather, HTC concedes that the circuit-loading plan for Canada it submitted was ambiguous in that it did not clearly indicate how HTC proposed to use the requested circuits or specify any use of TASI or other circuit-multiplication equipment. HTC notes, however, that its correspondent, TCTS, is currently unwilling to consider use of TASI in the early years of service. As a result, the 60 circuits we authorized in our Report and Order will not be sufficient to meet HTC's forecast of demand for circuits even in the first year of operation.

15. We agree that HTC's Master Loading Plan for Canada included in its June 28 comments is ambiguous. While the plan shows a need for 160 circuits in ANZCAN North in 1993, HTC had requested authority to acquire no more than 120 bearer circuits.[9] HTC's plan does not show how it proposes to meet its claimed need for 40 additional circuits. In its Petition for Reconsideration, however, HTC indicates that it had proposed to generate the additional 40 circuits by reconfiguring its holdings in ANZCAN North to decrease the nominal bandwidth of the circuits from 4 KHz to 3 KHz.[10] As HTC notes, reconfiguration of the 120 circuits it requested would increase the number of voice-grade circuits available to it by one-third to 160 (one-third of 120 is 40 additional circuits). However, HTC included with its petition a proposed, modified Table No. 21 which it requests permission to substitute in its June 1982 Master Loading Plan. That substitute plan indicates that HTC has changed its plans and will not reconfigure its ANZCAN North holdings before 1995. Rather, the substitute schedule shows that HTC will acquire a total of 120 4 KHz circuits and that it will introduce TASI on those circuits in 1990.[11] With the

---

[9] HTC's original Master Loading Plan showed that HTC would activate the 120 requested circuits by 1985. That level of use would have held constant until 1990, when the plan called for 126 circuits. In 1991 the plan called for 141 circuits, 157 in 1992, and 160 in 1993, 1994 and 1995. The plan showed no TASI and did not explain the source of the additional 40 circuits.

[10] The ANZCAN cable owners had originally proposed to build ANZCAN North with a bandwidth of 9 MHz, channelized into 1200 voice-grade circuits. Later, they increased the size of the cable to a 14 MHz system, to be channelized into 1840 voice-grade circuits with a bandwidth of 3 KHz. However, because of declining projections of traffic growth in the Pacific, the owners concluded that they would not need 1840 circuits. As a result, they proposed to reconfigure the 14 MHz cable to reduce the number of circuits to 1380 by using different channelizing equipment to yield circuits with a bandwidth of 4 KHz. The cable owners can change the configuration again at a later date if they find they need more circuits by installing new channelizing equipment to reduce the bandwidth of the circuits to 3 KHz.

[11] Specifically, HTC's modified Table 21 shows the following use of ANZCAN North for Canada service:

proposed use of TASI, HTC will be able to increase the effective capacity of its holdings in ANZCAN North to 240 circuits, even without reconfiguration.[12]

16. The analysis in our December 3 Report Order was based upon the plans submitted in this proceeding and concerns only the period through 1995. Our conclusions were even more limited, being restricted only to year-end 1986 and construction of the ANZCAN cable. The carriers, however, are required now to acquire facilities to meet needs throughout the period and, indeed, the life of the cable. The ANZCAN North Cable will be introduced in late 1983 and will have a useful life of 24 years. The cable will, thus, be in service through roughly the end of the year 2007. Viewed over the entire life of the cable, HTC's proposal to acquire 120 4 KHz bearer circuits appears reasonable. Based on its revised Master Loading Plan, through use of TASI circuit multiplication, HTC will have sufficient cable capacity to meet projected growth in Hawaiian/Canada traffic through 1995. In the event of greater-than-projected growth on that route, or to meet larger demands beyond 1995, HTC and its Canadian correspondent will have the option of reconfiguring their 120 ANZCAN circuits to reduce their bandwidth from 4 KHz to 3 KHz to derive an additional 40 bearer circuits, and through TASI use, to derive an additional 40 effective circuits.

17. We, thus, do not find HTC's decision not to reconfigure its ANZCAN North circuits at the outset to be unreasonable. Reconfiguration will remain as an option throughout the life of the cable should traffic demands require it and we can address that question in detail in subsequent planning proceedings. For present purposes, we note that HTC's revised loading plan for Canada shows a more efficient use of the circuits it requested than the one it had previously filed. HTC's revised Table 21 projects the use of TASI

| | | | |
|---|---|---|---|
| 1984 | 109 circuits | 1990 | 120 circuits |
| 1985 | 120 circuits | 1991 | 120 circuits |
| 1986 | 120 circuits | 1992 | 120 circuits |
| 1987 | 120 circuits | 1993 | 120 circuits |
| 1988 | 120 circuits | 1994 | 120 circuits |
| 1989 | 120 circuits | 1995 | 120 circuits |

The Plan shows the following use of TASI on ANZCAN North:

| | | | |
|---|---|---|---|
| 1984 | 0 circuits | 1990 | 24 circuits |
| 1985 | 0 circuits | 1991 | 44 circuits |
| 1986 | 0 circuits | 1992 | 72 circuits |
| 1987 | 0 circuits | 1993 | 96 circuits |
| 1988 | 0 circuits | 1994 | 120 circuits |
| 1989 | 0 circuits | 1995 | 120 circuits |

[12] If HTC later decides to reconfigure its ANZCAN North circuits, it will be able to increase its available bearer circuits to 160 and, with full TASI use, their effective capacity to 320 voice circuits.

circuit multiplication on its ANZCAN North circuits beginning in 1990 and on all 120 by 1994.[13] HTC, thus, has addressed the concern we expressed in our December 3 Report and Order concerning its refusal to use circuit multiplication. We, thus, will modify our December 3 Report and Order to provide for HTC's acquisition of 120 circuits for Canada service.

18. *European Service (ANZCAN North).* We turn now to the question of HTC's request for 35 circuits in ANZCAN North for service to Europe. In our Report and Order we denied HTC authority to acquire the circuits on the grounds that its proposal to use these circuits to serve Europe by transiting Canada and the INTELSAT AOR satellite was inefficient and unduly costly. HTC does not challenge our finding. Indeed, HTC's petition acknowledges that our proposed, alternative routing via the U.S. domestic satellite and TAT-7 would be more direct, and probably more efficient than routing traffic through Canada. The only reason HTC offers for asking us to reverse our prior finding is that it believes some of its overseas correspondents "may not" be able or willing to effect the proposed, alternate routing. In the first instance, HTC does not clearly state that its correspondents have refused to use the alternate routing or that they will not have TAT-7 circuits available for such use. HTC says only that that "may" be the case. The four countries involved, France, Germany, the Netherlands and the United Kingdom are all participants in the TAT-7 cable and, thus, have TAT-7 circuits they could use with HTC if they so elected. Of these four countries, HTC is now authorized to provide service directly only to the United Kingdom and Germany and did not participate in the proceeding which planned the TAT-7 cable. The parties also did not separate Europe/Hawaii traffic from other United States service. As a result, Hawaii traffic was included in the TAT-7 partners' overall projections. HTC has shown no reason why those will not be facilities available for this traffic.

19. We note that HTC included in its petition for reconsideration comments from its German and United Kingdom correspondents indicating a preference for using ANZCAN North for Hawaii/Europe service. Those entities, however, do not refuse to consider an alternative. At most, Germany speculates that its use of a U.S. domestic satellite is likely to be more costly than routing the traffic

[13] As shown in footnotes 11 and 12, *supra*, HTC's revised Table 21 reflects use of 120 bearer circuits and the use of TASI to derive an additional 120 effective voice circuits. The table, however, does not reflect any change in overall circuit demand during the planning period. Table 21 shows that the traffic to be carried on these additional TASI-derived circuits is traffic which it formerly had proposed to carry over the INTELSAT Pacific Ocean Region satellite. For example, in 1994, the year in which HTC's ANZCAN circuits will be fully equipped with TASI, HTC states that it will use 135 satellite circuits, where it had previously planned to use 215, and that its cable/satellite loading ratio will go from 42.7 per cent cable to 64.0 per cent cable.

via Canada and the INTELSAT satellite system. It does not, however, state any reason for this conclusion and, indeed, asks HTC to find out which is less costly. HTC does not include any information in its pleading on this point.[14]

20. HTC notes, generally, that its European correspondents are concerned that our denying HTC authority to purchase these circuits will adversely affect their investment in ANZCAN North. As we have indicated throughout our facilities planning proceedings, we have a statutory obligation to protect the U.S. ratepayers. While we are mindful that the European owners of ANZCAN wish to use the cable in which they have invested, we do not see this as a justification for imposing too-high costs upon our own ratepayers. Further, we see no reason why the alternate routing we have proposed would not be cost-effective for both entities. Further, since HTC is not now authorized to serve France or the Netherlands directly, HTC cannot reasonably argue that those entities based their decision to build the ANZCAN cable upon HTC's desire to purchase these 35 circuits, or that our denial of these circuits will unduly adversely affect those owners' investment decision. This controversy illustrates the advantage of advance planning efforts which involve all entities who will be affected by construction of a projected facility. We hope to avoid such problems in the future.

21. *Australia Service (ANZCAN South).* We are similarly unpersuaded by HTC's arguments concerning our refusal to authorize all 60 of the circuits it requested in ANZCAN South. In our Report and Order we found that HTC could meet its demand forecasts for service to Australia and maintain service quality with the 32 circuits we authorized—if it makes appropriate use of circuit-multiplication equipment—at a substantially lower cost. HTC does not challenge our finding. The only argument it offers in support of its request is its assertion that OTC is "unwilling" to consider use of circuit-multiplication equipment on ANZCAN South and that OTC believes that its investment in the 28 circuits we disallowed will go unused. As a result, HTC notes that, although it can meet its immediate needs to Australia via the 32 circuits we authorized, without circuit multiplication, it will need more circuits at some point in the future. HTC states that our action here will jeopardize its ability to meet those needs, because it has no assurance that OTC will agree to

[14] As we noted in our Report and Order, HTC's argument in favor of transiting Canada is inconsistent with its arguments in favor of direct service to Canada. In that request HTC stated that routing Canada traffic through U.S.-owned cables, which land on the West Coast of the United States, is not acceptable for direct Canada service because that would require transiting the United States to the Canadian border. HTC cannot, therefore, reasonably argue in favor of routing its European traffic via ANZCAN North and the INTELSAT Atlantic satellite, which will require transisting of Canada over terrestrial facilities, when it can use a direct domestic satellite hop virtually to the TAT-7 cable head.

introduce TASI, or that, if it does not so agree, there will be cable circuits available at such time as it needs them.

22. We are not persuaded that HTC will not be able to meet its traffic projections with the 32 circuits we authorized. OTC does not completely rule out the possibility of using TASI or other circuit-multiplication equipment on ANZCAN South.[15] We note that HTC's Master Loading Plan for Australia (Table 12) does not project the use of TASI at any time during the planning period. Indeed, it does not even project activation of all 60 requested circuits in ANZCAN South until 1994[16] and does not project use of any greater number of circuits. Yet, by contrast, during the same period, OTC and AT&T project full use of TASI on their ANZCAN South circuits. *See* AT&T Master Loading Plan. As a result, we do not believe that OTC will refuse to use TASI or other circuit-multiplication equipment.

23. As we found in our Report and Order, we have a duty to assure that U.S. carriers make the most efficient use of the facilities they include in their ratebases. HTC has not shown that its proposed use of the ANZCAN South circuits it requested is efficient. Based on HTC's own figures, HTC will be able to meet its demand forecasts through 1995 with 32 bearer circuits and the timely introduction of TASI. HTC did not make any projections of circuit needs beyond 1995. With TASI, HTC will be able to derive from those 32 circuits an effective capacity of 64 circuits, more than enough to meet its projections through 1995. Beyond 1995 HTC will be able to reconfigure its ANZCAN South circuits from 4 KHz to 3 KHz in the same way as it will its ANZCAN North circuits. Reconfiguration will allow HTC to derive an additional 10 (3 KHz) bearer circuits. If HTC then applies TASI it will have a total effective capacity of 84 circuits. Based on the growth patterns in its Master Loading Plan, those 84 circuits should allow HTC to meet its circuit needs for several years beyond 1995. If, however, traffic grows faster than expected, and HTC needs more circuits than its plan shows, HTC will be able to acquire capacity in the Pacific satellite or other facility. In any

---

[15] OTC in fact, states that it had planned to use such equipment as soon as the 60 circuits it requested are filled. OTC further states that, in view of its heavy investment in ANZCAN South, it is "reluctant" to incur the additional cost of introducing such equipment at the earlier date contemplated by our Report and Order. OTC's argument is set forth in a telex attached to HTC's petition for Reconsideration, Appendix B.

[16] HTC's June 28, 1982, Master Loading Plan calls for the following use of ANZCAN South circuits

| | |
|---|---|
| 1984 – 0 circuits | 1990 – 32 circuits |
| 1985 – 8 circuits | 1991 – 42 circuits |
| 1986 – 13 circuits | 1992 – 49 circuits |
| 1987 – 16 circuits | 1993 – 58 circuits |
| 1988 – 22 circuits | 1994 – 60 circuits |
| 1989 – 26 circuits | 1995 – 60 circuits |

event, the likely course of events beyond 1995 is too speculative to make any firm projections at this time. It was, indeed, for that reason that we deferred such questions to a later planning process.

24. While we can understand OTC's wish to maximize the use of its investment in cable facilities, we must also expect that it will give consideration to our desire to assure efficient use of such facilities. International comity cuts two ways. We believe that our authorization of HTC to purchase 32 circuits and to require timely use of TASI represents a reasonable way for HTC to meet its service-quality and traffic requirements while preserving the efficient use of facilities. We thus find no reason to overturn our prior findings.[17]

25. Accordingly, IT IS ORDERED that the above-referenced Petition for Partial Reconsideration of Hawaiian Telephone Company is GRANTED in part, and that, subject to the conditions set forth herein, paragraph 54 of the Commission's December 3, 1982, Report and Order is MODIFIED to read as follows:

> (6)We find that Hawaiian Telephone Company's acquisition of permanent ownership interests in 120 half circuits in ANZCAN North for service between Hawaii and Canada will serve the public interest;

but that the petition is otherwise DENIED in all respects.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

---

[17] We thus find unpersuasive HTC's argument that it may not be able to find cable circuits available once the 32 circuits we authorized it have been placed into service. We note first that this argument is inconsistent with its companion argument that the 28 circuits we failed to approve will go unused. If there is no other use for those circuits, they should be "available" to HTC should it later need them. Additionally, as we have noted, reconfiguration of the 32 circuits we have approved, with TASI, will give HTC substantial additional capacity.

Application, Amendment of, Current Information
Character Qualifications, Lack of Candor
Cut-Off Rules
Intervention, Request for Denied
Remand from Court of Appeals
Standing

Commission remanded comparative proceeding to ALJ for expedited consideration of renewal applicant's qualifications. Case before Commission by virtue of Court remand order directing the Commission to inquire into impact of licensee's disqualification in a related case. Standing of competing applicant affirmed, petitions for leave to amend granted for limited purpose of complying with Rule 1.65.
*–RKO General, Inc. (KHJ-TV)*
Docket No. 16679

FCC 83–274

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| RKO GENERAL, INC. (KHJ-TV)<br>Los Angeles, California | Docket No. 16679<br>File No. BRCT-58 |
| For Renewal of Broadcast License | |
| FIDELITY TELEVISION, INC.<br>Norwalk, California | Docket No. 16680<br>File No. BPCT-3655 |
| For Construction Permit for New Television Broadcast Station | |

MEMORANDUM OPINION AND ORDER

(Adopted: June 2, 1983; Released: June 8, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. Before the Commission for consideration is a Decision[1] by the

[1] *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (1981), *cert. denied*, 102 S.Ct. 1974, 2931 (1982).

United States Court of Appeals, District of Columbia Circuit, remanding a Commission Order[2] finding RKO General, Inc. (RKO) unqualified to remain the licensee of Station KHJ-TV, Los Angeles.[3] In its Decision the Court affirmed that part of the Commission's action finding RKO unqualified to remain the licensee of WNAC-TV, Boston, but did so on the single ground of lack of candor.[4] Given this more restricted view of RKO's disqualifying acts, the Court has directed the Commission to assess the impact of RKO's disqualification in Boston on RKO's qualifications as the licensee of KHJ-TV, noting that RKO's misconduct on the lack of candor issue did not occur directly before the trier of fact in the Los Angeles proceeding. The Court further directed the Commission to afford RKO an opportunity to demonstrate that KHJ-TV deserved treatment different from that accorded its Boston station.

*Motion to Terminate*

2. Also pending before the Commission is a Motion to Terminate the Los Angeles proceeding filed by RKO.[5] RKO argues that the involvement of the competing party in the Los Angeles case, Fidelity Television, Inc. (Fidelity), with respect to the Boston case was limited to questions pertaining to reciprocal trade practices, which have now been resolved in RKO's behalf.[6] RKO contends that Fidelity has no

[2] *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 355 (1980).

[3] This Order accompanied a Commission Decision finding RKO unqualified to remain the licensee of WNAC-TV, Boston, Massachusetts. *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980). The appeal of the subject Order had been consolidated by the Court with the appeals of the Commission's Boston Decision and a similar Order issued in Docket Nos. 19991–92. *RKO General, Inc. (WOR-TV)*, 78 FCC 2d 357 (1980).

[4] The Commission found RKO unqualified for its lack of candor in not reporting an investigation by the Securities and Exchange Commission (SEC) into the improper corporate practices of the General Tire & Rubber Company, the corporate parent of RKO, and for unequivocally denying charges raised by Community Broadcasting of Boston, Inc., a challenger in the Boston proceeding, when RKO knew or should have known that there was substantial truth to the allegations raised; for intentionally filing false and improper annual financial reports; and for engaging in illegal reciprocal trade practices. Reciprocal trade practices, or reciprocity, is the practice whereby one company conditions its purchases of goods from another company on the second company's willingness to purchase other products from the first.

[5] Motion of RKO General, Inc. for Termination of Pending Comparative Proceeding for Channel 9, Los Angeles and Norwalk, California filed August 25, 1982. Oppositions were filed September 17, 1982 by both Fidelity and the Broadcast Bureau, to which RKO filed a consolidated reply on October 4, 1982.

[6] After the Los Angeles case was designated for hearing, *RKO General, Inc. (KHJ-TV)*, FCC 66–503, released June 8, 1966, RKO and General Tire were charged by the Department of Justice with engaging in improper reciprocal trade practices violative of the antitrust laws. *U.S.* v. *The General Tire & Rubber Company, et al.*, Civil Action No. C-67–155, U.S.D.C., Northern District of Ohio, Eastern Division. Because of the impact these practices might have on RKO's basic qualifications, the Commission conditioned any grant of renewal in both the Los Angeles and

further role to play in this proceeding and its application for a construction permit should therefore be unconditionally denied.

3. RKO's pleading brings into sharp focus the question of whether the conditional language in the Los Angeles case was intended to cover all issues arising out of the Boston proceeding which might bear on RKO's qualifications or whether it was limited specifically to the reciprocity issues.[7] This question has been before the Commission on several occasions previosly, and it is clear that an expansive interpretation was the intention of the Commission.

4. In its Decision finding RKO unqualified to be the licensee of WNAC-TV, the Commission was faced with the question of the interrelationship between the Boston and Los Angeles proceedings. The Commission rejected RKO's contention that Fidelity's interest was limited to the pre-1975 designated issues on reciprocity and that those were the only issues bearing on RKO's qualifications to remain the licensee of KHJ-TV.[8] The Commission held that the two proceedings were interrelated because questions of reciprocity and the "matters under consideration as a result of the SEC investigation" both pertained to RKO's basic qualifications.[9] The Commission

---

Boston cases on the outcome of the antitrust suit. See *RKO General, Inc. (KHJ-TV)*, FCC 68–892, 14 RR 2d 90 (Rev. Bd. 1968) and FCC 68M-394, released March 11, 1968 and *RKO General, Inc. (WNAC-TV)*, 20 FCC 2d 846 (1969), respectively. However, the antitrust suit was terminated before questions of RKO's reciprocity were resolved. The Commission then directed that such questions should be addressed in the Boston proceeding, adding that any grant of renewal for KHJ-TV would be subject to the outcome of the Boston case. *RKO General, Inc. (KHJ-TV)*, 31 FCC 2d 70 (1971). The Commission made Fidelity a party to the Boston proceeding, and stated that final action in the KHJ-TV proceeding "would be held in abeyance pending the conclusion of the adjudicatory proceeding involving WNAC-TV Boston, Docket No. 18759, and that thereafter such action would be taken as appears to be necessary and appropriate in light of the evidence introduced in, and the outcome of, the Boston proceeding concerning the qualifications of RKO to be or to continue to be a licensee." *RKO General, Inc. (KHJ-TV)*, 44 FCC 2d 123, 137 (1973). The Administrative Law Judge in the Boston proceeding thereafter concluded that there was "no reason to either disqualify RKO as a licensee or to assess [a] comparative demerit against its proposal . . ." under the reciprocal trade practices issue. *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 147, 335 (I.D. 1974). The Commission reached a different conclusion, *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980), but was reversed by the Court, *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (D.C. Cir. 1981).

[7] Two issues based on reciprocity were designated against RKO in the Boston proceeding: 1) whether RKO had engaged in illegal reciprocal trades and 2) whether General Tire and RKO employees had testified falsely in the Los Angeles proceeding regarding their knowledge of the reciprocal trade practices of General Tire and RKO.

[8] *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d at 24–25.

[9] After the parties had filed exceptions to the ALJ's Boston Decision, Community Broadcasting, Inc. (Community) filed a petition to enlarge issues against RKO. Community Petition to Reopen the Record, Enlarge the Issues and Remand for Further Hearing, filed December 10, 1975. Community charged General Tire, RKO's corporate parent, with a vast array of improper foreign and domestic practices. RKO unequivocally denied any impropriety. Opposition to Community's

also relied on the Court's earlier pronouncement that Fidelity could appeal any decision reached in Boston "and the agency's interpretation of it in deciding whether to revoke RKO's license for KHJ. . . ."[10]

5. Additionally, when RKO requested approval of its assignment application to the two competing Boston applicants, Community and The Dudley Station Corporation (Dudley), Fidelity filed a petition in that proceeding asking the Commission to refrain from taking any action that might be prejudicial to its rights against RKO in the Los Angeles proceeding.[11] RKO in turn asserted that Fidelity had no standing to participate in the Boston proceeding on questions not pertaining to reciprocity.[12] The Commission in effect rejected RKO's contention when it subsequently permitted Fidelity to participate in oral argument and to file pleadings on the impact of questions raised by the Special Report on RKO's qualifications in the Boston case.[13]

---

Petition to Reopen filed January 21, 1976. Meanwhile, the Securities and Exchange Commission (SEC) had, by May 1975, initiated its own investigation into the same questions raised by Community. The SEC upgraded its inquiry into a formal investigation in February 1976. General Tire reported the SEC's inquiries to its stockholders in its annual stockholders report, 1975 Annual Report of the General Tire & Rubber Company, pp. 4–5. *See* Proposed Findings and Conclusion of Fidelity Television, Inc., pp. 35–37 and Exhibit 3, submitted August 27, 1979 in the Boston proceeding. However, RKO did not report these matters to the Commission until after the SEC had filed a Complaint, *SEC* v. *The General Tire & Rubber Company and Michael Gerald O'Neil*, No. 76–0799, filed May 10, 1976, against General Tire and had negotiated a final judgment of permanent injunction (Final Judgment) ordering General Tire to cease its questionable overseas and domestic activities. Final Judgment of Permanent Injunction against the General Tire & Rubber Company and Michael Gerald O'Neil, No. 76–0799, filed May 10, 1976. The Commission ultimately concluded that RKO was unqualified to remain the licensee of WNAC-TV for, *inter alia*, its lack of candor in reporting the SEC investigation. *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980). As a consequence of the interrelationship between the Boston and the Los Angeles proceedings, the Commission further concluded that RKO's disqualification in Boston compelled its disqualification in Los Angeles. *Id.* at 117 and *RKO General, Inc. (KHJ-TV)*, 78 FCC 2d 355 (1980).

[10] *Fidelity Television, Inc.* v. *FCC*, *supra*, 515 F.2d at 693 n.13.

[11] Petition to Deny Assignment Application and Comments on Joint Petition for Approval of Agreement filed October 6, 1978 by Fidelity (Docket Nos. 18759–61). Fidelity subsequently argued that it had an absolute right to participate in the Boston proceeding without any restrictions as to the issues bearing on RKO's qualifications. See, Reply to Joint Opposition to Petition to Deny filed November 13, 1978 with addendums filed November 14 and 18, 1978; Reply to Comments of RKO General, Inc. filed December 21, 1978; Comments on Joint Motion for Expeditious Disposition, filed March 5, 1979; Reply to RKO's Proposed Findings and Conclusions filed September 24, 1979. These pleadings were all submitted in the Boston proceeding.

[12] *See Joint Opposition to Petition to Deny, filed October 26, 1978; Comments on Fidelity's Reply, filed December 7, 1978; Proposed Findings, Conclusions and Proffered Evidence, filed August 27, 1979 (Appendix B); and Reply of RKO General, Inc. filed September 24, 1979. These pleadings were also filed in the Boston proceeding.*

[13] *See* Order, *RKO General, Inc. (WNAC-TV)*, FCC 79–403 released June 28, 1979.

6. We also reject RKO's assertion that this proceeding should be opened to new applicants. Fidelity has thus far been found basically qualified to be a Commission licensee.[14] Under our rules and procedures, an applicant in an adjudicatory proceeding is entitled to a final Commission decision on the merits of its application without consideration of belated challengers.[15] Other than Fidelity and RKO, no entity filed an application prior to the cut-off date. Only if both applicants were found unqualified would we have reason to entertain new applications for this station.[16]

*Issues on Remand*

7. Having disposed of this preliminary matter, we turn next to a discussion of the questions which must now be considered in the context of the RKO/Fidelity contest. In its Boston Decision, the Commission found three independent grounds for RKO's disqualification: 1) RKO's involvement in illegal reciprocal trade practices; 2) RKO's intentional filing of false and misleading annual financial reports; and 3) RKO's lack of candor in its dealings with the Commission.[17] Relying on the language conditioning renewal of KHJ-TV's license on the outcome of the Boston proceeding, the Commission further concluded that RKO's disqualification in Boston compelled a similar conclusion with regard to RKO's stewardship of Station KHJ-TV.[18]

8. On review, the Court rejected the Commission's conclusion that RKO's reciprocal trade practices warranted its disqualification. The Court also found an inadequate basis for the Commission's conclusion that RKO had intentionally, and with an intent to deceive, filed false annual financial statements. The Court held that it was error to premise disqualification on this ground, without holding a further evidentiary hearing. However, the Court agreed that RKO's lack of candor supported the Commission's conclusion

[14] *RKO General, Inc. (KHJ-TV)*, 44 FCC 2d 149 (I.D. 1969); *RKO General, Inc. (KHJ-TV)*, 44 FCC 2d 123 (1973). The Court did not disturb this conclusion. *Fidelity Television, Inc.* v. *FCC*, 502 F.2d 443 (D.C. Cir. 1974). *Fidelity Television, Inc.* v. *FCC*, 515 F.2d 684, *rehearing denied* 515 F.2d 703 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975).

[15] *Ashbacker Radio Radio Corp.* v. *FCC*, 326 U.S. 333 (1945), and *see generally RKO General, Inc. (WNAC-TV), supra*, 78 FCC 2d at 319–321. *Ranger* v. *FCC*, 111 U.S. App. D.C. 44, 294 F.2d 240 (1961).

[16] *See, e.g., FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), *WORZ, Inc.* v. *FCC*, 345 F.2d 85 (D.C. Cir. 1965).

[17] *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980).

[18] *RKO General, Inc. (KHJ-TV)*, 78 FCC 2d 355 (1980). A similar conclusion was reached in a third proceeding, which involved RKO's renewal application for Station WOR-TV, New York City. *RKO General, Inc. (WOR-TV)*, 78 FCC 2d 357 (1980). That case has since been terminated upon RKO's agreement to relocate its VHF channel in Secaucus, New Jersey. FCC 82–559, released March 29, 1983.

that RKO was unqualified to remain the licensee of WNAC-TV, Boston.

9. In light of the narrower grounds underlying RKO's disqualification, and the fact that the sole remaining basis for finding RKO disqualified occurred only in the Boston proceeding, the Court rejected the Commission's conclusion that RKO's disqualification in Boston automatically compelled a similar conclusion in the Los Angeles case. It thus remanded the Commission's Los Angeles Order for further consideration.[19]

10. *Candor.* In its Decision the Court recognized that RKO's lack of candor in the Boston proceeding is *res judicata.*[20] *Accordingly, no further evidence on this narrow question need be permitted and the parties may address the resultant legal question, i.e.,* the impact of that conclusion on RKO's qualifications to remain the licensee of KHJ-TV, by written submissions and/or oral argument, as deemed appropriate by the ALJ. Furthermore, before making this determination, RKO will have an opportunity to make a broad showing of the broadcast history and policy of KHJ-TV in mitigation of any adverse findings that might otherwise be made.[21]

11. *Barter and Trade.* General Tire kept inaccurate records of its barter and trade transactions involving exchanges of unsold air time for programming, merchandise, services and other things of value. As a direct result of these inaccurate records, RKO submitted false financial reports to the Commission. In its remand the Court stated, at page 226: "Whether RKO submitted inaccurate reports knowingly and with intent to mislead the Commission remains an unresolved and material question of fact. . . ." An issue will be specified to allow resolution of this matter.

12. A second area of concern has developed as a result of the barter and trade practices. During the course of the Boston proceeding RKO informed the Commission that the Internal Revenue Service (IRS) had initiated an audit of RKO's barter and trade transactions.[22] At that time RKO stated its belief that "it ultimately will be able to provide information satisfactory to the IRS for all but a small fraction of the total barter transactions reported to the FCC for the years [1971–76] in question. Even as to the remaining fraction for which documentation sufficient to meet IRS requirements for validating expense deductions may not be found, RKO believes it will

---

[19] The Court stated: "RKO's misconduct did not occur before the trier of fact in either the Los Angeles or New York City proceedings. Accordingly, these decisions must be remanded to the Commission for further consideration as it deems appropriate." *RKO General, Inc. (WNAC-TV)* v. *FCC, supra,* 670 F.2d at 236.

[20] *Id.* at 237.

[21] *Id.* See also fn. 43, *infra.*

[22] Proposed Findings, Conclusions and Proffered Evidence filed August 27, 1979 by RKO, at p. 29 (Docket Nos. 18759–61).

be able to obtain some reasonable proof as to the disposition of a portion thereof." In Reply Comments filed September 24, 1979 RKO reported that "[I]t now appears that RKO will ultimately be able to document to the satisfaction of the IRS the disposition of all but a small fraction of its barter consideration."[23]

13. Approximately a year later, and after the Commission had issued its decision finding RKO unqualified in Boston, RKO notified the Commission that the IRS examination had been completed and a report had been issued.[24] RKO then reported that the IRS proposed assessing an additional income tax against General Tire and its subsidiaries of $24,494,538, of which $20,100,000 was in dispute. Again RKO represented that it intended to submit "additional documentation with respect to the deductibility of the items disallowed by the Internal Revenue Service in the examination reports."[25]

14. On December 31, 1981, RKO filed a "Statement for the Information of the Commission" indicating that it had reached an agreement with IRS to pay $13 million in additional income tax. On April 20, 1982, RKO reported an assessment of still additional income tax for years not covered by the earlier settlement. We will not inquire into the conduct that resulted in the tax underpayment. Our concern is limited to RKO's efforts to assuage Commission concern over the then pending IRS investigation. Whether RKO had a basis for predicting an optimistic outcome to the investigation in the light of all other pertinent circumstances is critical. An appropriate candor issue will be specified.

15. We will remand this case to an ALJ for further proceedings in accordance with the Court's Order. In order to insure the earliest possible determination concerning RKO's qualifications, we will direct the presiding ALJ to consider on an expedited basis the questions concerning RKO's basic qualifications, *i.e.*, RKO's lack of candor, whether RKO intentionally filed false annual financial reports, and whether RKO was lacking in candor in its assurances regarding the IRS investigations into its past tax deficiencies. At the same time, the ALJ should also consider what impact, if any, these matters have upon RKO's comparative qualifications. Upon completion of these proceedings, the ALJ shall prepare, consistent with the need for expedition, a Supplemental Initial Decision covering the above matters. Any appeal from the Supplemental Initial Decision will be filed with the Commission.

---

[23] Reply of RKO General, Inc. filed September 24, 1979 at p. 25.

[24] Statement for the Information of the Commission filed August 12, 1980 by RKO General, Inc.

[25] *Id.*

*Remaining Considerations*

16. At this time we will also dispose of a number of other pleadings which have accumulated over the course of this proceeding. The first of these is a Fidelity Motion to Expedite and to Place KHJ-TV's Profits in Escrow.[26] By our action today we are moving towards a resolution of this protracted case at the earliest possible time. With respect to the question of placing KHJ-TV's profits in escrow, such a course of action is statutorily prohibited. Under Section 307(d) of the Communications Act, 47 U.S.C. §307(d), the Commission is obliged to continue the license in effect when it has not acted upon a renewal application prior to the expiration of the previous license term. Unlike the cases relied upon by Fidelity, RKO has not been found finally disqualified. Hence, it is entitled to continue as the licensee of KHJ-TV until a final determination is reached. Accordingly, this aspect of Fidelity's petition will be denied.

17. Two petitions for Leave to Intervene are also pending before the Commission. The first of these is part of a Petition for Extraordinary Relief filed February 27, 1980 by The Committee to Eliminate the UHF Handicap on Television in Los Angeles (Committee). Section 1.223 of the Rules requires that a potential intervenor must set forth its interest in the proceeding; show how its participation will assist the Commission in its determination of designated issues; delineate any proposed new issues which should be considered; explain why it was unable to file its petition within 30 days after publication in the Federal Register of the hearing issues or any substantial amendments thereto; and submit affidavits from persons with knowledge of the facts set forth in the petition. On analysis of the Committee's pleading we conclude that the petition was untimely and totally lacking affidavits from persons having personal knowledge of the alleged facts which the Committee wishes to have the Commission consider; and has failed to explain how its participation will in any way assist the Commission in disposing of the issues before us. Having failed to make the threshold showing necessary for intervention, the Committee's request will be denied.

18. Moreover, the Committee's suggestion that new applications be accepted would require waiver of the Commission's cut-off rules. The cut-off rules are designed to permit this agency to close the door to new parties so that a choice can be made between timely filed applicants,[27] thereby giving timely filed applicants protection[28]

---

[26] Motion to Expedite Los Angeles Remand Proceeding and Place KHJ-TV Profits in Escrow filed November 4, 1982 by Fidelity. An Opposition was filed by RKO on November 16, 1982 and Comments by the Broadcast Bureau on November 23, 1982.

[27] *See RKO General, Inc. (WNAC-TV)*, 89 FCC 2d at 320–321, for a comprehensive discussion of the policy and practice underlying the cut-off rules.

[28] *Ranger* v. *FCC*, 111 U.S. App. D.C. 44, 47, 294 F.2d 240 (1961).

against opportunistic late-comers. The Committee has shown no unusual and compelling circumstances warranting waiver of this rule. The remaining aspects of the Committee's request for extraordinary relief envision combining rulemaking[29] with the present adjudicatory proceeding. In light of the different standards governing rule making and adjudicatory proceedings, it has been the Commission's policy not to consider allocation questions in the context of a comparative broadcast hearing.[30]

19. A second petition for leave to intervene has been filed by a group identifying itself as the City of Angels Broadcasting, Inc. (City of Angels).[31] The petition will be denied. City of Angels has not shown how its participation will assist the Commission in the resolution of any outstanding issues. Nor has the petitioner included affidavits from persons with knowledge of the facts set forth in its pleading. Finally, City of Angels failed to show good cause for its late filing. In sum, City of Angels has totally failed to meet the criteria for intervention prescribed in Section 1.223 of our Rules.[32]

20. Also pending before the Commission are three Fidelity Petitions for Leave to Amend,[33] which have been opposed by the Bureau and/or RKO.[34] The three opposed amendments reflect changes in Fidelity's application regarding ownership and business and broadcast interest changes of its stockholders. A fourth petition reports steps Fidelity has undertaken to assure that all future changes to its application will be timely and accurately filed.[35]

21. The subject matter of the three opposed amendments reflect voluntary events that occurred prior to the 30 day time period for reporting changes, and Fidelity has not shown good cause for its late

---

[29] Changes to the Television Table of Assignments are accomplished through rulemaking proceedings. *See* Section 1.401, 1.420 and 73.606 of the Commission's Rules. *See also Logansport Broadcasting Corp.* v. *United States*, 93 U.S. App. D.C. 342, 210 F.2d 24 (1954).

[30] *See e.g., David L. Kurtz*, 19 RR 1367 (1960).

[31] Motion for Leave to Intervene and Petition to Reopen Proceedings filed June 13, 1980.

[32] In light of our dismissal of the City of Angels' Motion for Leave to Intervene, we will dismiss as moot that petitioner's Motion for Leave to File an Additional Pleading and its accompanying Reply Comments both filed August 28, 1980.

[33] The dates of these petitions are November 27, 1979, February 22, 1980, and June 9, 1980, respectively.

[34] The Bureau filed oppositions on December 5, 1979, March 4, 1980 and June 17, 1980, respectively, with RKO limiting its objections to the first two petitions. Fidelity filed unauthorized responses to the December 5, 1979 and March 4, 1980 oppositions, which will be dismissed pursuant to Commission Rule, Section 1.294.

[35] Petition for Leave to Amend, filed September 29, 1980. This proposed amendment was filed in response to a recommendation made in the Broadcast Bureau's pleading filed August 19, 1980 pursuant to Commission Order, FCC 80–329, 78 FCC 2d 355, released June 6, 1980.

filings. Consequently, Fidelity has failed to satisfy the prerequisites of Section 73.3522(b)(1).[36] On the other hand, Fidelity is obliged to keep its application current.[37] Moreover, acceptance of these amendments will not prejudice RKO since Fidelity will not gain any comparative advantage.[38] Nor would acceptance of the amendments disrupt this proceeding. Accordingly, the amendments will be accepted,[39] but for the sole purpose of permitting compliance with 47 C.F.R. 1.65 by Fidelity.[40] Fidelity's September 29, 1980 amendment will be accepted for the same reason, to keep its application current, and with the same caveat that no comparative advantage will accrue to Fidelity.

22. A final pleading pending before the Commission is a "Motion to Strike or Dismiss" filed by RKO on October 21, 1976. Briefly, RKO filed a request on September 21, 1976 seeking to spin off RKO General, Inc. from its parent corporation, the General Tire and Rubber Company. When Fidelity opposed the spin-off request, RKO filed the instant motion. In our Decision granting a construction permit to NETV, Inc. for a new television station to operate on Channel 7, Boston, Massachusetts (Docket Nos. 18759–61),[41] we disposed of this underlying spin-off proposal as moot.[42] Accordingly, the Motion to Strike an opposition to that spin-off proposal will similarly be dismissed as moot.

23. ACCORDINGLY, IT IS ORDERED, That the record is reopened and remanded for expedited proceedings in accordance with this Memorandum Opinion and Order under the following issues:

(1) To determine whether in light of its disqualification in Docket Nos. 18759–61, RKO has the requisite qualifications to remain the licensee of Station KHJ-TV, for Los Angeles.

---

[36] Section 1.65 of the Commission's Rules imposes a continuing obligation to maintain a current application. Information no longer accurate and complete in all substantial respects must be corrected "as promptly as possible and in any event within 30 days, unless good cause is shown."

[37] Rule 73.3522(b)(2) permits acceptance of post designation amendments upon a good cause showing for late filing.

[38] *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140 (Rev. Bd. 1970).

[39] *Cf. International Panorama TV, Inc. (KTON-TV)*, FCC 81M-850, released March 25, 1981 (ALJ).

[40] Acceptance of Fidelity's amendments does not constitute a prejudgment of the effect, if any, of the applicant's failure to amend its application in a timely fashion. This question may be addressed more fully by the Presiding Judge after a determination is made regarding RKO's basic qualifications.

[41] *RKO General, Inc. (WNAC-TV)*, 89 FCC 2d 297 (1982). *See also RKO General, Inc. (WHBQ)*, 82 FCC 2d 291, 297–305 (1980) and *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1, 118 (1980).

[42] *RKO General, Inc. (WNAC-TV)*, 89 FCC 2d at 342. RKO's 1976 spin-off proposal was considered moot because of, *inter alia*, subsequent superseding spin-off requests filed March 13, 1980 and July 3, 1980.

(2) To determine whether RKO General, Inc. intentionally filed false and misleading financial reports with the Commission.

(3) To determine whether RKO misled the Commission or was lacking in candor in providing details of the IRS investigation into RKO's and General Tire's tax deficiencies.

(4) To determine whether KHJ-TV's history and policy mitigates any adverse conclusions reached above.[43]

(5) To determine whether, in light of evidence adduced under the foregoing issues, RKO General, Inc. possesses the requisite qualifications to remain the licensee of KHJ-TV.

(6) To determine what impact, if any, the findings with respect to the foregoing issues may have upon RKO's comparative qualifications in seeking renewal of its license for KHJ-TV.

24. IT IS FURTHER ORDERED, That the Motion to Expedite and to Place KHJ-TV's Profits in Escrow filed November 4, 1982 by Fidelity Television, Inc. IS GRANTED to the extent herein indicated and IS DENIED in all other respects.

25. IT IS FURTHER ORDERED, That the Petition for Extraordinary Relief filed February 27, 1980 by the Committee to Eliminate the UHF Handicap in Television in Los Angeles IS DENIED.

26. IT IS FURTHER ORDERED, That the Motion for Leave to Intervene and Petition to Reopen Proceedings filed June 13, 1980 by the City of Angels Broadcasting, Inc. IS DENIED.

27. IT IS FURTHER ORDER, That the Motion for Leave to File an Additional Pleading filed August 28, 1980 by City of Los Angeles Broadcasting, Inc. IS DISMISSED as moot.

28. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend filed November 27, 1979, February 22, 1980, June 9, 1980 and September 29, 1980 by Fidelity Television, Inc. ARE GRANTED and the amendments ARE ACCEPTED.

29. IT IS FURTHER ORDERED, That the Motion to Strike filed December 18, 1979 by the Broadcast Bureau IS GRANTED and the Responses filed December 14, 1979 and March 14, 1980 by Fidelity Television, Inc. ARE DISMISSED.

30. IT IS FURTHER ORDERED, That the Motion to Strike or Dismiss filed October 21, 1976 by RKO General, Inc., IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

[43] The right of RKO to offer mitigating evidence stems from the Court's recognition that "individual stations have different broadcast histories and policies." *RKO General, Inc. (WNAC-TV)* v. *FCC, supra*, 670 F.2d at 237. Because of these differences the Court concluded that KHJ-TV was entitled "to appear directly before the Commission and to argue that they deserve different treatment than RKO's Boston station." *Id.*

Administrative Law Judge, Discretion
Application, Amendments of, Need for
Estoppel
Expedited Action
Party, Joinder of

Competing applicants made parties to remanded proceeding involving same licensee. Parties to select representative counsel and ALJ to exercise broad discretion in expediting case. Commission will invoke collateral estoppel to preclude relitigation of common issues. During pendency of inquiry into licensee's qualifications, rules authorizing amendments to applications are suspended.
*–RKO General, Inc. (WHBQ-TV)*

FCC 83–341

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| RKO GENERAL, INC. | |
| For Renewal of Licenses for Stations: | |
| WHBQ-TV, Memphis, Tennessee[1] | File No. BRCT-79042LC |
| WHBQ, Memphis, Tennessee | File No. BR-79042CZ |
| WOR, New York, New York | File No. BR-177 |
| WRKS(FM), New York, New York | File No. BRH-14 |
| WRKO, Boston, Massachusetts | File No. BR-953 |
| WROR(FM), Boston, Massachusetts | File No. BRH-617 |
| KHJ, Los Angeles, California | File No. BR-22 |
| KRTH(FM), Los Angeles, California | File No. BRH-25 |
| WGMS, Bethesda, Maryland | File No. BR-1403 |
| WGMS-FM, Washington, D.C. | File No. BRH-789 |
| KFRC, San Francisco, California | File No. BR-43 |

[1] In view of the developments noted below, the proceeding involving Docket Nos. 80–590 through 80–602 will be terminated by a subsequent order and new docket numbers will be assigned when these applications become ripe for further consideration.

| | |
|---|---|
| WAXY(FM), Ft. Lauderdale, Florida | File No. BRH-781002WR |
| WFYR(FM), Chicago, Illinois | File No. BRH-7901A3 |

MEMORANDUM OPINION AND ORDER

(Adopted: July 14, 1983; Released: July 15, 1983)

BY THE COMMISSION:

*Scope of the Order*

1. On June 8, 1983, the Commission released a Memorandum Opinion and Order (FCC 83–274) remanding the KHJ-TV Los Angeles, California proceeding (Docket Nos. 16679–80) to an Administrative Law Judge for further proceedings. At that time we stated our intent to limit the questions on remand to six issues[2] arising from a related Boston proceeding (Docket Nos. 18759–61) and, based on resolution of these issues, to reach a final determination as to RKO's basic and comparative qualifications to remain the licensee of KHJ-TV, Los Angeles, California. In the interest of saving time and avoiding relitigation of common issues it is our further intent to apply the findings and conclusions reached in that proceeding to the 13 other RKO proceedings insofar as they involve similar questions of RKO's basic and comparative qualifications. Accordingly, it is the purpose of this Order to fashion a procedure which will afford all interested parties an opportunity to exercise their rights in the Los Angeles proceeding. At the same time, we intend to restrict the number of counsel actually appearing before the Commission, a consideration occasioned by the filing of over 160 applications which

[2] These six issues are:

(1) To determine whether in light of its disqualification in Docket Nos. 18759–61, RKO has the requisite qualifications to remain the licensee of Station KHJ-TV, for Los Angeles.

(2) To determine whether RKO General, Inc. intentionally filed false and misleading financial reports with the Commission.

(3) To determine whether RKO misled the Commission or was lacking in candor in providing details of the IRS investigation into RKO's and General Tire's tax deficiencies.

(4) To determine whether KHJ-TV's history and policy mitigates any adverse conclusions reached above.

(5) To determine whether, in light of evidence adduced under the foregoing issues, RKO General, Inc. possesses the requisite qualifications to remain the licensee of KHJ-TV.

(6) To determine what impact, if any, the findings with respect to the foregoing issues may have upon RKO's comparative qualifications in seeking renewal of its license for KHJ-TV.

seek to displace RKO as the licensee of its other 13 broadcast facilities.[3]

*Interrelationship between KHJ-TV Proceeding and the Thirteen Other RKO Licensed Stations*

2. Before turning to the specific courses of action which we are herein adopting, a brief history of the interrelationship between the Los Angeles proceeding and the thirteen other RKO licensed stations is in order. The Los Angeles case was designated for hearing on June 8, 1966 (FCC 66–503). While that case was pending two other comparative proceedings were commenced in conjunction with RKO's renewal applications for WNAC-TV Boston and WOR-TV, New York City, respectively. Although none of RKO's other remaining thirteen licensed stations were challenged for renewal, the Commission conditionally granted renewals for those stations based on the outcome of the Los Angeles, Boston, and New York proceedings.[4] After releasing its Decision finding RKO unqualified to remain the licensee of Station WNAC-TV, Boston,[5] the Commission elected to reopen the prior conditionally granted renewals.[6] The Commission recognized that the conditions placed on those license renewals were basically the same as those placed on RKO's New York and Los Angeles renewal applications and that the underlying question pertinent to all of RKO's broadcast holdings was the impact of the Boston proceeding findings on RKO's qualifications to remain a Commission licensee. Pursuant to Court Order[7] the Commission

[3] The majority of these applicants are represented by forty-four different law firms. Twelve applicants are proceeding *pro se*.

[4] As we explained in our order reopening the thirteen other RKO renewal proceedings, *RKO General, Inc. (WHBQ-TV)*, 82 FCC 2d 291, 295 n.14:

> Except for 2 licenses, all of the most recently granted renewals contained the following condition or language to similar effect: "This [renewal] grant is conditioned on, and without prejudice to whatever action, if any, the Commission may deem appropriate as a result of final action in the outcome of the proceedings in Docket Nos. 16679 [Los Angeles], 18759 [Boston] and/or 19991 [New York]." The license of Station WAXY(FM), Fort Lauderdale, Florida, was renewed on January 23, 1979 for the period 1979–82 with a referral to the earlier license dated January 10, 1976. The 1976 license was conditioned on the outcome in Boston; the 1979 application was granted "on the same conditions and in accordance with the same provisions" as the 1976 license, and was valid only when posted with the earlier license. The most recent renewal of Station KFRC, San Francisco, California, was not conditioned due to administrative error. KFRC's earlier grants were conditioned, and nothing occurred during the license terms to change the condition. . . .

[5] *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980).

[6] *RKO General, Inc. (WHBQ-TV)*, 82 FCC 2d 291 (1980), *vacated in part and remanded sub nom. New South Media Corporation* v. *FCC*, 685 F.2d 708 (D.C. Cir. 1982).

[7] *New South Media Corporation, supra.*

directed the filing of applications which would be mutually exclusive with RKO's thirteen reopened renewal applications.[8] One hundred sixty-four competing applications were subsequently filed by the May 12, 1983 cut-off date.

3. The question to be resolved in the Los Angeles case, *i.e.*, the impact of the Boston decision on RKO's qualifications (Issues 1, 2 and 3), is similar to that underlying RKO's thirteen remaining renewal applications. It thus follows that a consolidated proceeding involving all interested parties and focusing on the three issues common to all of RKO's outstanding renewal applications will best conduce to the efficient dispatch of the Commission's business.

*Party Status*

4. By separate Order[9] we will therefore make all pending applicants parties to the Los Angeles proceeding for the limited purpose of participating in the resolution of questions which are common to RKO's overall basic and comparative qualifications and which arose out of the Boston proceeding.[10] Because we are opening the door to a multitude of additional parties, certain procedures must, however, be adopted to avoid an otherwise unmanageable situation. These procedures fall along several lines.

5. Foremost, we intend to channel the participation of these applicants through representative counsel. This will forestall the presentation of repetitious questions and pleadings while assuring that the collective concerns of these parties will be fully considered during this phase of the proceeding. Hence, the parties are expected to present their arguments and to participate generally in this proceeding through representative counsel.[11] Adoption of this procedure is designed to permit resolution of Issues 1, 2 and 3 in an efficient and timely manner.

6. In this regard we believe that it is appropriate to afford the applicants the opportunity to devise a workable plan to facilitate the use of representative counsel. Given the desire to expedite resolution of this matter, those applicants who intervene will therefore be afforded 30 days from the release date of this order to submit a plan for representative counsel to the Commission for its approval.[12]

---

[8] *RKO General, Inc. (WHBQ-TV)*, FCC 83–55, released February 11, 1983.

[9] *See* Order, *RKO General, Inc. (KHJ-TV)*, FCC 83–342, adopted July 14, 1983.

[10] *See* Rule 1.221(d). *See also* Federal Rule of Civil Procedure 19. For those applicants who elect not to file a notice of appearance within the prescribed time limit, we direct attention to that part of Section 1.221(e) which reads: "Any person so named [as a party in interest] who fails to file this written statement [of appearance] within the time specified, shall, unless good cause for such failure is shown, forfeit his hearing rights."

[11] *See generally, Note, Collateral Estoppel of Nonparties*, 87 Harv. L. Rev. 1485, 1499 et seq. (1974).

[12] The procedures we are establishing are not intended to precipitate a change in

Failure of the parties to arrive at a workable solution will necessitate the specification by the Commission of appropriate procedures. This matter appears infinitely more amenable to private, voluntary resolution.[13]

*Collateral Estoppel*

7. The procedure herein adopted is designed to assure that the common issues in question are fully and fairly litigated in one proceeding.[14] By according all parties their day in court, the doctrine of collateral estoppel[15] will preclude any relitigation of the common designated issues (1, 2 and 3) in subsequent proceedings involving RKO's thirteen other broadcast stations.[16] If resolution of these

---

the existing scheduled date for commencement of the Los Angeles hearing. Given the Commission's desire to expedite the proceeding, we in fact urge the ALJ and parties to adhere to the strict time schedule already established.

[13] *See e.g., ASD Answer Service, Inc.*, CC Docket Nos. 82–587 et seq. where the parties voluntarily agreed to the use of representative counsel. To facilitate the applicants' efforts in this regard, the Commission Meeting Room, No. 856, 1919 M St, N.W., Washington, D.C. will be made available at 9:00 a.m. on July 26, 1983 for the purposes of a meeting of all interested parties.

[14] "[T]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by reducing the possibility of inconsistent decisions." *Montana* v. *United States*, 440 U.S. 147, 153–154 (1979), cited in *Arizona* v. *California*, 51 U.S.L.W. 4325, 4329 (1983). *Cf. Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), *Hardy* v. *Johns-Manville Sales Corp.*, 681 F.2d 334, 338, *Teitelbaum Furs, Inc.* v. *Dominion Insurance Co.*, 58 Cal 2d 601, 606–07, 375 P. 2d 439, 441, *cert. denied*, 372 U.S. 966 (1962) and *Note, Collateral Estoppel of Nonparties*, *supra*, 87 Harv. L. Rev. at 1491 n.39.

[15] Invocation of the doctrine of collateral estoppel bars relitigation of the same issues in subsequent proceedings involving the same parties or their privies. 1B *Moore's Federal Practice*, ¶0.441[2], at 3777 (2d ed. 1974). Davis, relying on the Restatement (Second) of Judgments (1982), explains that the:

> traditional language of "res judicata" and "collateral estoppel" has given way to the new vocabulary of "claim preclusion" and "issue preclusion." The second restatement helpfully explains . . .: The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. A related but narrower issue-that one who has actually litigated an issue should not be allowed to relitigate it-underlies the rule of issue preclusion. 4 Davis, *Administrative Law Treatise*, §21:1, at 48 (2d ed. 1983).

Other than the Los Angeles proceeding, the doctrine of *res judicata* is inapplicable, for we are not adjudicating the question of which of several competing applicants should be granted a license for any one station. Each of these matters constitutes a separate cause of action. *See RKO General, Inc. (WHBQ-TV)*, 82 FCC 2d at 291, 312, 313 (1980). Instead we contemplate relying on the doctrine of collateral estoppel which is considered "a part of the broad doctrine of res judicata . . . which prevents a second litigation of the same issues even in connection with a different claim or cause of action." 4 Davis, *Administrative Law Treatise*, Section 21:2 at 50 (2d ed. 1983).

[16] *Cf. Southwest Airline Co.* v. *Texas International Airlines*, 546 F.2d 84, 95 (5th Cir.

matters does not result in the disqualification of RKO under Issue 5, the question of the impact of the findings made under issues 1, 2, and 3 on RKO's comparative qualifications must also be addressed (Issue 6). If it is determined that a negative comparative demerit should be assessed, this determination is again common to all of RKO's licenses. Accordingly, there will be no need to relitigate that question, of whether a comparative demerit should be assessed, nor the scope of such demerit if a negative assessment is in fact levied against RKO. Instead, the parties will be bound by these determinations, although RKO will be given an opportunity to offer evidence in mitigation in each of the separate comparative proceedings when those cases become ripe for consideration. By the same token, RKO is entitled to offer relevant mitigating evidence in the Los Angeles proceeding pursuant to designated Issue 4, a right guaranteed by the Court when it remanded the KHJ-TV Los Angeles proceeding to the Commission.[17]

*Deferring of Predesignation Amendments*

8. As previously noted, 164 competing applications have been filed in the captioned proceedings. It is the Commission's normal practice to release a public notice announcing the acceptance for filing of the last-filed mutually exclusive application.[18] This notice serves three purposes: it informs the public of the applications that have been accepted for filing; it sets a time certain in which petitions to deny can be filed against these applications; and it establishes a time frame within which applicants can offer amendments as a matter of right.[19] The rationale for permitting amendments as a matter of right is to permit the applicants to perfect their applications prior to designation, thereby facilitating the Commission's objective of "an early stabilization of the comparative factual situation which must ultimately go to hearing."[20]

9. Once the time for filing amendments as a matter of right has expired, applicants must thereafter demonstrate good cause before a tendered amendment will be accepted. Included in this range of amendments are those filed pursuant to Sections 1.65 and 73.3514 of our rules, 47 C.F.R. §§1.65 and 73.3514. Amendments under Section

---

1977). The present state of the law suggests that even nonparties may be able to invoke the doctrine. *See* 4 Davis, *Administrative Law Treatise*, Section 21:1 at 48 (2d ed. 1983), thereby negating the requirements of mutuality that once laid at the cornerstone of the doctrine. *See Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979) and *Bernhard* v. *Bank of America*, 19 Cal. 2d 807, 122 P. 2d 892 (9th Cir. 1942).

[17] *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 237 (1981), *cert. denied*, 102 S.Ct. 1974, 2931 (1982). See para. 13, *infra*.

[18] See *Revised Processing of Broadcast Applications*, 72 FCC 2d 202, 207–208 (1979).

[19] See Section 73.3522(a)(2) of our Rules, 47 C.F.R. §73.3522(a)(2).

[20] *Revised Processing of Broadcast Applications, supra*, at 210, 211.

1.65 are "designed to keep the Commission apprised of all substantial and decisionally significant changes,"[21] while Section 73.3514 requires "applicants to provide all of the information called for in the application form."[22]

10. However, at the present time we are not concerned with the information contained in those applications. Instead, our present concern lies in the expeditious resolution of the issues stemming from the Boston proceeding. Since we are not in a position to focus on the issues that must be specified in these thirteen other proceedings, and since the Commission is not in a posture to make a public interest determination as to which applications should be granted in these thirteen other proceedings, no useful purpose will be served by requiring the applicants who are competing against RKO's other thirteen stations to tender amendments to their proposals while the KHJ-TV proceeding is in its current status. The Commission will not be acting on or processing those applictions and to require amendments would place an unnecessary burden on both the applicants and the agency.

11. Accordingly, to avoid consideration of matters that are not germane to the designated issues, we are hereby suspending the provisions of Section 73.3522(a)(2), which permits applicants to file amendments as a matter of right, and are deferring the requirement that these applicants file amendments under Sections 1.65 and 73.3514 of the Commission's Rules. After the specified issues in the Los Angeles proceeding are resolved, the Mass Media Bureau will issue an appropriate public notice ("B" cut-off list) announcing the time that amendments can be filed as a matter of right and an Order reimplementing the requirements of Sections 1.65 and 73.3514.[23]

12. Along these lines, on July 11, 1983 Magna Media Corporation, Boston Radio Corporation, Potomac Broadcasting Corporation, East Lake Communications, Inc. and Adwave Company filed joint "Comments Concerning RKO Procedures." These commentors, which have filed competing applications for construction permits in New York City, Boston, Massachusetts, Washington, D.C./Bethesda, Maryland, Chicago, Illinois and Ft. Lauderdale, Florida, respectively,

---

[21] *Payne of Virginia, Inc.*, 66 FCC 2d 633, 643 n.25 (1977).

[22] *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1490 n.2 (Rev. Bd. 1979).

[23] We recognize that a B cut-off list was issued in the WHBQ-TV, Memphis, Tennessee proceeding on June 1, 1983 (Report No. B-65) and that the time for filing amendments as of right for those applicants expired July 11, 1983. Consistent with the instant Order we will defer processing any amendments filed pursuant to that B cut-off list and will extend to those applicants a second opportunity to file amendments as of right when those proceedings become ripe for consideration. By the same token, we advise all parties that action constituting major changes to their applications, see Sections 73.3572, 73.3573 and 73.3574 of our rules, will result in the assignment of a new file number. Such applicants will be precluded from participating in any further proceedings.

suggest that the Los Angeles proceeding is the appropriate forum to resolve matters of general applicability concerning RKO's basic and comparative qualifications. These applicants urge the Commission, however, to initiate immediately thirteen parallel proceedings involving the remaining RKO renewal applications. Applicants argue that this course of action is compelled by the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *New South Media Corp.* v. *FCC*, 685 F.2d 708, 52 RR 2d 1 (D.C. Cir. 1982).

13. We will deny applicants' request to initiate parallel proceedings at this time. The holding in *New South* directed the Commission to fashion a procedure which would permit competing applications to be filed against RKO's conditionally renewed license applications, but left it to the Commission to decide which procedure to adopt, stating that it was not "purporting to direct the particular mode in which the Commission should now proceed, . . ." *New South*, *supra*, at 711. By Order, FCC 83–55, released February 11, 1983, the Commission accordingly adopted a procedure which led to the filing of 164 competing applications by the May 12, 1983 cut-off date.

14. It is our determination that the most orderly and expeditious way to resolve all the questions concerning RKO's qualifications and determine who will be the licensee of the various stations is to proceed as we have outlined above without initiating parallel proceedings. We believe that conducting the 13 proceedings after resolution of the issues in KHJ will allow RKO and the applicants to avoid litigating unnecessary issues and will create improved chances for settlement. We anticipate that this approach will ultimately result in final resolutions of those proceedings being reached more rapidly than would be the case were we to institute parallel proceedings. Thus, the resolution of the 13 proceedings will not have been delayed by the procedure herein adopted.

*Scope of Issues and Mitigating Evidence*

15. As noted, we are limiting the present inquiry to the impact of the Boston decision, and to the facts developed in the Los Angeles proceeding, on RKO's qualifications to remain the licensee of KHJ-TV. Accordingly, requests for additional issues against RKO will be entertained only if they are based on facts and circumstances specifically growing out of the Boston proceeding.[24] By the same token, since the focus of our inquiry is on RKO's qualifications, petitions to enlarge issues against any other party will not be considered at this time. Such requests will be considered in due course, after the specified issues in the Los Angeles proceeding are first resolved.

[24] If RKO is found basically qualified under Issues 1, 2 and 3, the parties in the 13 renewal cases may then raise whatever other basic qualifications questions they feel are warranted and supported by the facts in their respective cases.

16. Along these lines we are specifically limiting RKO's showing of mitigation to its stewardship of KHJ-TV. Although RKO has previously adduced evidence on this question, the Court, which has had the Los Angeles proceeding before it on three earlier occasions,[25] has directed the Commission to make new findings with regard to the history and policy of KHJ-TV in Los Angeles.[26] Such evidence will serve two purposes. First, if the evidence adduced under issues 1–3 indicate that RKO is *prima facie* disqualified, evidence of KHJ's history and policies may be considered in mitigation.[27] Second, if RKO is found basically qualified, this further evidence may mitigate any adverse conclusions that might otherwise be drawn against RKO's comparative qualifications.

17. To further expedite the Los Angeles proceeding we urge the Administrative Law Judge to order submission of the parties' direct affirmative cases in writing before commencement of any oral hearing. We also strongly suggest that the parties stipulate to facts and issues not in genuine dispute, to submit affidavits on other aspects of the case whenever possible[28] and to confer on any matter, including procedure, which may aid in the prompt disposition of this case. Along these lines we expect the ALJ to exercise his broad discretion and authority in eliminating any unnecessary procedures and avoiding any unwarranted delays in the conduct of the Los Angeles proceeding. Finally, as we stated in our June 8, 1983 RKO Order, any exceptions which the parties desire to interpose shall be filed directly with the Commission for its consideration.[29]

18. ACCORDINGLY, IT IS HEREBY ORDERED, That the above-described applicants ARE DIRECTED to proceed in accordance with the provisions of this Order.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

---

[25] *Fidelity Television, Inc.* v. *FCC*, 502 F.2d 443 (D.C. Cir. 1974); *Fidelity Television, Inc.* v. *FCC*, 515 F.2d 684, *rehearing denied*, 515 F.2d 703 (D.C. Cir.), *cert. denied*, 423 U.S. 926 (1975).

[26] *RKO General, Inc.* v. *FCC*, 670 F.2d at 237. In view of the limited nature of this inquiry, no useful purpose would be served by allowing the applicants competing for RKO's 13 other stations to participate in the resolution of Issue 4.

[27] *See, e.g., Wagoner Radio Co.*, 12 FCC 2d 978 (Rev. Bd. 1968).

[28] We recognize that the issues pertaining to the filing of RKO's 324 Reports and to RKO's submissions of information on the status of the IRS inquiries involve questions of demeanor and credibility, and hence may not be amenable to the submission of affidavits. We nonetheless urge the ALJ and the parties to avoid cumulative and repetitious testimony and to adopt whatever measures they deem appropriate in streamlining this proceeding without sacrificing the completeness of the record needed to make a final determination on the critical questions in issue.

[29] *RKO General, Inc. (KHJ-TV)*, FCC 83–274, para. 15.

Control, Transfer of, Unauthorized

Mutually exclusive applications designated for hearing. Failure to file an application for transfer of control based on a gradual change of majority of board members of a licensee's parent, nonprofit, non-stock entity will not reflect adversely on licensee where the requirement for such application is unclear and the licensee has otherwise notified the Commission of the changes.

–*Seven Locks B/cing Co.*

MM Docket No. 83–667

FCC 83–309

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In Re Applications of | |
| SEVEN LOCKS BROADCASTING COMPANY | MM Docket No. 83–667 File No. BR-810527UB |
| Has: 950 kHz, 1 kW, DA, D | |
| For Renewal of License For Station WCTN Potomac-Cabin John, Maryland. | |
| CELEBRITY BROADCASTERS, INC. Potomac-Cabin John, Maryland | MM Docket No. 83–668 File No. BP-810831AT |
| Req: 950 kHz, 1 kW, DA, D | |
| For Construction Permit. | |

HEARING DESIGNATION ORDER

(Adopted: June 29, 1983 Released: July 8, 1983)

BY THE COMMISSION: COMMISSIONER FOGARTY NOT PARTICIPATING.

1. The Commission has before it for consideration the above-captioned, mutually exclusive applications of Seven Locks Broadcasting Company ("Seven Locks") for renewal of its license for station WCTN, Potomac-Cabin John, Maryland, and of Celebrity Broadcasters, Inc. ("Celebrity") for a construction permit on the frequency occupied by WCTN. The applications must be designated for comparative hearing, because they are mutually exclusive. Celebrity also filed a petition to deny Seven Locks' renewal application. Such

petitions are ordinarily considered predesignation motions to specify issues and dismissed as prematurely filed. They should be submitted to the presiding Administrative Law Judge after designation. *Revised Processing of Broadcast Applications*, 72 FCC 2d 202 (1979). In this case, however, we have elected to consider at this point Celebrity's allegations as to an unauthorized transfer of control, because a novel question has been raised that we have not recently had an opportunity to address.[1] [2]

2. Celebrity argues that an issue should be specified against Seven Locks for an alleged unauthorized transfer of control, a violation of Section 310(d) of the Communications Act of 1934, as amended.[3] All of the stock of Seven Locks is owned by Christ Church of Washington ("Church"), a non-profit organization. The Church is run by a seven-person Board of Deacons. Celebrity contends that these Deacons are the same as the board of governors of a non-profit organization and so should be considered by the Commission as the equivalent of equal owners of a for-profit organization. Four of the seven Deacons have been replaced since Seven Locks acquired the station in 1973. This constitutes a transfer of majority control, according to Celebrity, for which a transfer application must be filed and Commission consent obtained. Celebrity also contends that the former pastor of the Church controlled the affairs at the Church; that he was the driving force for the acquisition of the station; and that he was in direct control of the Church and the radio station. That pastor has since resigned his position, and a new pastor has been installed. This, according to Celebrity, resulted in a *de facto* transfer of control, which also required prior Commission approval. Celebrity concludes that a clear violation of a statutory provision has been committed by Seven Locks, and that this "shows a lack of proper qualifications to continue as a Commission licensee." Anticipating Seven Locks' response, Celebrity asserts that an absence of

---

[1] Seven Locks' opposition to the petition to deny was filed four days late. Nonetheless, we shall consider its opposition as to the issue of unauthorized transfer of control, because the pleading aids in the disposition of the allegations. Comments filed by Celebrity on June 15, 1983, to Seven Locks' Petition for Leave to Amend of August 30, 1982, and Seven Locks' reply to the comments, raise similar concerns which are pertinent to the unauthorized transfer of control issue.

[2] On August 30 and December 1, 1982, Seven Locks petitioned to amend its application to provide information required by Section 1.65 of the Commission's Rules. Similarly, Celebrity petitioned to amend its application on November 9, 1981. For good cause shown, these amendments are accepted. Nonetheless, no comparative advantage will accrue to either applicant as a result of accepting the amendments.

[3] "No . . . station license, or any rights thereunder, shall be transferred, assigned or disposed of in any manner, . . . directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public, interest, convenience, and necessity will be served thereby. . . ." 47 U.S.C. §310(d).

bad faith cannot mitigate this intentional violation, citing *Central Florida Enterprises, Inc.* v. *FCC.* 598 F.2d 37, 44 RR 2d 345 (D.C. Cir. 1978); *cert. den.* 441 US. 957 (1979).

3. Seven Locks first responds that a board of governors of a non-profit corporation is only equated with a corporation's owners, for want of any other standard, to compare stock and non-stock corporate applicants under various comparative criteria, such as integration of management, past experience, and diversification. It maintains that in no previous case has the same analogy been used for determining when a transfer of control took place or a transfer application was required. It continues that *Pacifica Foundation*, 41 FCC 2d 71 (Rev. Bd. 1973), with very similar facts, specifically held that it was unclear whether it was necessary to file a transfer application in a case where a majority of the board of a non-profit applicant had gradually changed. Seven Locks further argues that, in general, it is inapt to treat a board of governors as the owners of a company.[4] It claims that its own Church has a "congregational" form of government, with a register of members and a continuity of "ownership" and "control," and that its Deacons, whose membership is controlled by the congregation, are better compared to a corporation's officers. It states that the Church's pastor is responsible to the Deacons and to the congregation, and thus does not have the "substantiality of the actual control" necessary to impute actual control.[5] Finally, Seven Locks argues that if it is determined on either grounds that a technical violation has occurred, such a violation is of little consequence and does not reflect adversely on its qualifications, especially in view of its complete disclosure of all relevant facts in its various filings with the Commission. It concludes that this case is even less compelling than the *Pacifica* case above, in which no adverse action was taken.

4. No unauthorized transfer of control issue can be added against Seven Locks on the basis of the evidence presented here. The Commission has never clearly set forth the circumstances which would constitute a transfer of control, requiring the prior consent of the Commission, with regard to non-stock corporate licensees or other licensee entities comprised of a membership body which elects a governing board. We do not believe it appropriate, in the context of the instant case, to set forth a broad policy of general applicability

[4] Seven Locks contends that such a requirement puts an onerous and unnecessary burden on the Commission and on those institutions which have a high turnover rate in their governing bodies (for example, high schools or universities). Furthermore, the Commission's policies are not necessarily advanced, it argues, as many institutions have their control "diffused within the institution." An institution such as the Church has a continuity of "ownership" and "control" in the body of its congregation, which controls the membership of the Deacons, according to Seven Locks.

[5] *See WHDH, Inc.*, 17 FCC 2d 856 (1969).

which would adequately address the question of a transfer of control covering all non-stock licensees. This is a matter which will be explored independently. For present purposes, it is sufficient to find that the necessity for such a filing was unclear, as it was in *Pacifica Foundation, supra.*[6] There is no evidence of any bad faith or intent to deceive by Seven Locks in this matter; to the contrary, all of its Ownership Reports and its subject application are accurate in denoting the current Deacons.[7] Finally, Celebrity has not presented sufficient evidence that the former pastor of the church exercised such *de facto* control of the radio station as to require the filing of a transfer application upon his retirement from the church. It has offered no specific facts to support its general allegation that the pastor was in direct control of the radio station. Its allegations concerning the pastor's position in the Church, even if substantiated, would not alone demonstrate that the change in pastors vested in a new individual "the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue." *WHDH, Inc., supra.*

5. Celebrity has presented no evidence of compliance with the local public notice requirements of Section 73.3580 of our Rules (47 C.F.R. §73.3580) and will be ordered to do so, *infra.*

6. Celebrity and Seven Locks appear to be qualified to operate as proposed and their applications will accordingly be set for a comparative hearing.

7. Accordingly, IT IS ORDERED, That the petition to deny filed by Celebrity Broadcasting Company IS GRANTED to the extend indicated above and DISMISSED in all other respects.

8. IT IS FURTHER ORDERED, That Celebrity Broadcasters, Inc. shall inform the presiding Admnistrative Law Judge within thirty days of the release of this Order as to whether it has complied with the public notice requirements of Section 73.3580(f) of the Commission's Rules.

9. IT IS FURTHER ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned

---

[6] Since no adverse action would be taken in that case, the Review Board declined to state whether a transfer application was actually required. 41 FCC 2d at 72.

[7] In *Central Florida, supra,* which Celebrity cites, the court did state that "people are held to intend the obvious consequences of their acts." *Id.* at 52. The "obvious consequences" which the court held that the licensee in that case must have intended was the *de facto* relocation of its main studio after a series of gradual shifts of activities from its nominal main studio. It continued in the next two sentences that "[the applicant] is chargeable with knowledge of the [subject] regulation. Thus, we are left with an intentional violation of a Commission Rule." *Id.* For the reasons stated above, Seven Locks cannot be chargeable with such knowledge. Celebrity also argues that because Seven Locks operates a commercial station, it is subject to some higher standard than the applicant for a noncommercial educational station in *Pacifica, supra.* We find no basis upon which to distinguish the two situations.

applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate a written appearance stating an intention to appear on the date fixed for the hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing (either individually or, if feasible and consistent with the Rules, jointly) within the time and the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

12. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send, by Certified Mail - Return Receipt Requested, a copy of this Hearing Designation Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Candor
Comparative Hearing
Cross Interest
Ownership Disclosure
Review by Review Board
Television Station, Authorization

Review Board affirms Initial Decision and grants application with substantial diversification and integration preferences and slight-to-moderate comparative demerit for careless lack of candor in reporting principal's voting interest in another licensee as "non-voting" and failing to report other licensee's application for, and subsequent grant of, television station in region. Cross-interest policy clarified.
–*Superior B/cing of Calif.*
BC Docket No. 80–734

FCC 83R–52

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| Jack O. Koonce and Melvin J. Querio d/b/a | |
| SUPERIOR BROADCASTING OF CALIFORNIA Chico, California | BC Docket No. 80–734 File No. BPCT-781221LI |
| THE FAR WEST BROADCASTING CO., INC. Chico, California | BC Docket No. 80–735 File No. BPCT-790815KP |
| For Construction Permit for a New Commercial Television Station | |

*Appearances*

*Vincent J. Curtis, Jr.*, and *Richard Hildreth*, on behalf of Superior Broadcasting of California; and *Herbert D. Miller, Jr.*, on behalf of The Far West Broadcasting Co., Inc.

## Decision

(Adopted: July 19, 1983; Released: July 25, 1983)

Board Member Blumenthal for the Review Board:

1. This proceeding involves the mutually exclusive applications of Superior Broadcasting of California (Superior) and The Far West Broadcasting Co., Inc. (Far West) for authority to construct a new UHF commercial television station to operate on Channel 24 at Chico, California. By *Hearing Designation Order*, 45 Fed. Reg. 79904, published December 2, 1980, their applications were designated for consolidated hearing on (1) a limited financial issue against Far West and (2) the standard comparative issue to determine which applicant would better serve the public interest.[1] By *Memorandum Opinion and Order*, FCC 81M-2284, released July 23, 1981, presiding Administrative Law Judge (ALJ) Joseph P. Gonzalez added issues to determine: (1) whether Superior had fully reported the broadcast interests and associations of its principals and the effect thereof on its basic and comparative qualifications; and, (2) whether Superior would provide the required signal strength to the entire community of license and the effect thereof on its comparative qualifications. Subsequently, the ALJ reconsidered the signal strength issue and deleted it on his own motion. *Order*, FCC 81M-3968, released December 16, 1981. By *Memorandum Opinion and Order*, FCC 81M-2509, released August 13, 1981, a public inspection file issue was added against Superior on a comparative basis only. Previously, the ALJ had granted Far West's motion for partial summary decision and favorably resolved the limited financial issue that had been designated against it. *Memorandum Opinion and Order*, FCC 81M-2238, released July 22, 1981.

2. In an *Initial Decision* (*I.D.*), FCC 83D-6, released February 4, 1983, the ALJ granted the Superior application after finding that its derelictions on the reporting issue were minor and did not detract decisionally from its basic qualifications. The *I.D.* further concluded that Superior was comparatively the best applicant because: (a) Superior warranted a substantial diversification preference inasmuch as Far West's 80% stockholder, Kelly Broadcasting Co., is the licensee of Station KRCA-TV, Sacramento, California, which has extensive over-the-air and cable audience penetration in the Chico area, whereas there is no evidence to show that the three television stations and one AM station, whose ownership is partly attributable to Superior, have any audience penetration in the Chico area; (b) Superior, which has 100% full-time integration credit, merits a substantial integration preference over Far West, which has only

[1] The application of Southwest Television, Ltd. (File No. BPCT-790815KQ), also designated for consolidated comparative hearing, was subsequently dismissed at the applicant's request. *Order*, FCC 81M-271, released January 28, 1981.

20% full-time credit; (c) Superior is entitled to summary decision on the public file issue; and (d) Superior should not be assessed any comparative demerit under the reporting issue because no intent to conceal or deceive was shown and because the matters not timely or accurately reported were, at most, only slightly decisionally significant.

3. The proceeding is now before the Review Board on exceptions filed by Far West and a reply brief filed by Superior. The Board has reviewed the *I.D.* in light of the exceptions and briefs, the oral argument held April 29, 1983, and our examination of the record. We adopt the findings of fact in the *I.D.*, except as modified herein, and affirm the ALJ's ultimate conclusion that a grant of the Superior application will best serve the public interest, convenience, and necessity.

4. *Reporting Issue.* The ALJ found that Superior violated Sections 1.65 and 73.3514 of the Rules, 47 CFR §§1.65 and 73.3514,[2] because: (1) it "inaccurately" reported as "non-voting" the 12% voting stock interest in KLOC Broadcasting Co., Inc. owned by Melvin J. Querio, one of two co-equal partners in Superior[3]; (2) it did not report timely the filing in August 1976 by KLOC Broadcasting of an application for a television station at Concord, California; (3) it failed to report the November 24, 1976 filing and subsequent grant on August 8, 1979 of a KLOC Broadcasting application for television Station KCBA-TV, Salinas, California; and (4) it failed to report that Querio served as a director of the licensee of Station KTXL-TV, Sacramento, California, from January 21, 1972 to June 16, 1974, was a director and vice-president of KLOC Broadcasting from July 20, 1965 to July 15, 1974, and had a 52% ownership interest in Station KTRT-AM, Truckee, California, from July 24, 1968 to January 21, 1972. *I.D.*, paras. 25, 38. Additionally, after finding that Superior had no motive or intent to conceal, deceive, or misrepresent; but exhibited only faulty judgment and carelessness and that the above matters were, at most, of slight decisional significance, he concluded that neither disqualification of Superior nor assessment of a comparative demerit was warranted. *I.D.*, paras. 39–43.

5. The gravamen of Far West's exceptions concerns the ALJ's refusal to disqualify Superior or to assess it a comparative demerit for not timely and accurately reporting the present and past

[2] Section 1.65 requires an applicant to amend its pending application within 30 days whenever the information furnished therein is no longer substantially accurate and complete in all significant respects, or whenever there has been a substantial change as to any other matter which may be of decisional significance. Section 73.3514 requires that an application include all information called for by the application form. *See, e.g., Nuance Corp.*, 85 FCC 2d 412, 415–16 (Rev. Bd. 1981).

[3] KLOC Broadcasting is the licensee of Station KLOC-TV, Modesto, California, and KCBA-TV, Salinas, California, is a 10% owner of Station WCPT-TV, Crossville, Tennessee, and was previously the licensee of Station KLOC-AM, Ceres, California. *I.D.*, para. 14.

broadcast interests of Querio. In particular, Far West asserts that: (1) Superior intentionally misled the Commission concerning Querio's simultaneous business relationships with Stations KLOC-TV and KTXL-TV in order to avoid specification of a cross-interest issue against it; (2) Superior's reporting derelictions concerned matters of decisional significance; (3) Querio testified falsely concerning his knowledge of KLOC Broadcasting's filing of its application for Station KCBA-TV, Salinas, and the ALJ erred in denying its motion to reopen the record and add a requested misrepresentation issue; and (4) Superior's reporting derelictions were so frequent and egregious that, regardless of its motive or intent, a substantial comparative demerit, at a minimum, should be assessed against it. We address these matters below.

6. We reject Far West's contention that the desire to avoid specification of a cross-interest issue motivated Superior to camouflage Querio's simultaneous roles at Stations KLOC-TV and KTXL-TV (*see, e.g.*, Far West's Exhs. 8–17) because the record makes clear—and Far West does not contend otherwise—that any such potential cross-interest policy "violation" had ceased to exist *before* the instant Superior application was filed.[4] Consequently, no cross-interest issue could have been specified against Superior. A cross-interest issue is, by nature, a prospective one and is "grounded in concern over 'the *potential* for conflict of interest, unfair competition, and detriment to the public interest' inherent in certain types of business relationships," *Cleveland Television Corp.*, 91 FCC 2d 1129, 1134 (Rev. Bd. 1982) (*quoting Eastern Broadcasting Corp.*, 30 FCC 2d 745, 755 (Rev. Bd. 1971) (emphasis added), *review denied*, FCC 83–235, released May 18, 1983, *appeal pending sub nom. Cleveland Television Corp.* v. *FCC*, No. 83–1659 (D.C. Cir., filed June 15, 1983). It is not a character issue, and no negative qualifying or comparative implications flow from an applicant's possible past brush with the cross-interest policy. Any comparative ramifications arising from an applicant's attributable interests in mass media are properly evaluated under the diversification criterion of the standard comparative issue. *See id.*, 91 FCC 2d at 1133–35 and 1139 n.4. Here, Far West

[4] To state that a party might "violate" the cross-interest policy is to leave the misimpression that the policy enunciates some hard-and-fast rule. Actually, the cross-interest policy is a broader-based corollary to the cross-ownership rules, which policy evinces concern whenever a party to one application presently possesses a "meaningful relationship" to another broadcast station in the same locale so as to create a concern that the stations involved would not be fully competitive or would have access to each other's confidential business information. *See generally Cleveland Television Corp., infra*, 91 FCC 2d 1145–46 (concurring statement) and cases cited therein. Judgments as to the applicability of the cross-interest policy are made on a case-by-case basis depending on the nature of the relationship between the subject party and the stations involved. *See, e.g., Morris, Pierce and Pierce*, 88 FCC 2d 713 (Rev. Bd. 1981), *review denied*, FCC 83–31, released January 25, 1983.

concedes that Querio left the employ of Station KTXL-TV before Superior's application was filed with the Commission. Far West Exh. 10, at 14. Therefore, no cross-interest question emanating from that employment remained for the ALJ's (or our) consideration (*see* FCC 81M-2284, *supra*), and no motive to avoid such an issue can be imputed to Superior. To dwell any longer on the problematic question of whether Querio ever had tempted the cross-interest policy would be prodigal.

7. Conversely, we do agree, in part, with Far West's contentions concerning Superior's mischaracterization of Querio's 12% voting interest in KLOC Broadcasting as "non-voting" as well as Superior's failure to report the filing and subsequent grant of the KLOC Broadcasting application for a new television station in Salinas (*see supra* note 3). A "factor of primary significance" in choosing among comparative broadcast applicants is the criterion of diversification of control of the mass media, which "constitutes a primary objective in the licensing scheme." *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965). Common ownership interests in other broadcast stations are weighed more heavily against an applicant the closer they are geographically to the proposed community of license. *Id.*, at 394–95. Hence, Superior's characterization of Querio's KLOC ownership interest as "non-voting" potentially affected the outcome of the proceeding, especially when the KLOC Broadcasting television licenses in the region (Modesto and Salinas) and its attributable radio interest in Ceres, California (and, to a lesser extent, its 10% interest in a distant Tennessee television station) are considered. *See supra* note 3; *I.D.*, paras. 14, 44. There is a vital difference between the way the Commission considers non-voting stock and the way it considers voting stock. Thus, insofar as they promote diversification of media control, the Commission's rules limiting multiple ownership focus almost exclusively on voting stock, *see, e.g.*, 47 CFR §§73.35, 73.240, 73.636 NOTES 2–7, while non-voting stock is generally of considerably lesser concern. *Cleveland Television*, *supra*, 91 FCC 2d at 1139. *See also Evening Star Broadcasting Co.*, 67 FCC 2d 318, 324 (1978) ("ownership of preferred stock will not invoke the strictures of the multiple ownership rules absent contingent control rights"). Querio has been involved in broadcasting for many years and is the principal of a Commission licensee; he is presumptively aware of the difference between the Commission's regulatory treatment of voting and non-voting stock. We might even go so far as to infer that it was precisely because of Querio's awareness of the significance of voting stock to our diversification principles that the applicant cast his ownership interest in KLOC Broadcasting as non-voting, but for the fact that

collateral Commission records clearly list Querio's holdings in the licensee (KLOC Broadcasting) in their factual form.[5] Ergo, an intent to categorically misrepresent the actual nature of Querio's broadcast holdings is difficult to find. *Vogel-Ellington Corp., supra* note 5, 41 FCC 2d at 1010–11. The characterization of his stock as non-voting (based on Querio's later oral assertion that he refrains from voting the stock) is therefore viewed essentially as a heedless shading of his interests so as to tint those interests with the most favorable comparative coating. Nonetheless, Superior's mischaracterization of the stock as non-voting, without any explanatory annotation, was demonstrably less than candid; and it concerned a matter of decisional importance. The Commission must rely on the absolute candor of applicants—more so now than ever because our license application forms rely increasingly on bare representations and less on documentation, *see Revision of Application for Construction Permit for Commercial Broadcast Station*, 50 RR 2d 381 (1981). In terms of forthrightness in describing the broadcast ownership interests of its principals, Superior was not, and its lack of full disclosure here indicates that its reliability as a licensee expected to demonstrate full and complete candor to the Commission is somewhat less than unqualified. *See generally Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1136–38 (Rev. Bd. 1982), *modified* 53 RR 2d 44 (1983). A slight-to-moderate demerit should have been assessed, and we penalize Superior in that degree. *See generally Radio Station WABZ, Inc.*, 90 FCC 2d 818, 825–27 (1982), *appeal pending sub nom. Victor Broadcasting, Inc.* v. *FCC*, No. 82–1964 (D.C. Cir. 1982).

8. Additionally, Superior failed to timely report in this proceeding the filing and subsequent grant of the KLOC Broadcasting television application for Salinas. *I.D.*, paras. 25, 36, 41. Because that station is an attributable regional broadcast interest, Superior's reporting failure here materially relates to the diversification comparison between the applicants. *See supra* para. 7. However, we agree with the ALJ that Superior's failure to report this matter was careless rather than misrepresentational since the Salinas grant to KLOC Broadcasting was an open matter of public record. Querio testified that he had not been aware of when the Salinas application had been filed or granted. Tr. 340–345. Far West claims that Querio misrepresented his lack of awareness concerning the Salinas application (and it also claims that the ALJ erroneously denied its motion to reopen the record to explore this alleged misrepresentation) because

[5] *See* Far West Exh. 8 (FCC Forms 323 (ownership) filed by KLOC Broadcasting (1974–80)). But, even when accurate information is elsewhere on file at the Commission, applicants are expected to make full and accurate disclosure in separate licensing proceedings. *See generally Vogel-Ellington Corp.*, 41 FCC 2d 1005, 1010 (Rev. Bd. 1973). The Commission's files are large indeed, and some say—well—imperfect. It is the applicant's affirmative duty to bring its other media interests to the Commission's attention and not the responsibility of a competing applicant to ferret them out. *Id.*

on November 8, 1976, and again on December 8, 1977, Querio wrote a letter guaranteeing a portion of the financing for the Salinas television applicant, KLOC Broadcasting. That application was filed on November 24, 1976, and finally granted on August 8, 1979. What emerges from Querio's testimony, however, is that he did not concern himself deeply with the actual filing of the Salinas application, and took no active part in following the application's progress through the multi-year administrative process. Notwithstanding, Querio—as a 50% principal in this proceeding and as an owner of a 12% interest in KLOC's Salinas application—was required to determine what new media interests, including the Salinas station, KLOC Broadcasting might have acquired before forwarding his own list of media interests to Superior for incorporation into the instant application. Querio's lack of intent to flatly deceive the Commission is confirmed, again, by the plain fact that his KLOC Broadcasting interests were already on public file with the Commission. *See Vogel-Ellington Corp., supra.* Still, a slight comparative demerit should have been assessed for the Salinas reporting omissions. *See generally Radio Station WABZ, supra.* In this case, though, any demerit for inaccurate reporting of Querio's broadcast interests is well-encompassed within the slight-to-moderate demerit assessed previously against Superior for reporting inaccuracies, *see supra* para. 7.

9. *Summary.* Superior has a substantial diversification preference[6] and a substantial integration preference[7] over Far West, against which must be weighed a slight-to-moderate comparative demerit for Superior's inaccurate and late reporting of the broadcast interests of its principal, Melvin J. Querio. In our view, this demerit is not of such magnitude as to overshadow the significant comparative preferences Superior enjoys and, thus, Superior remains comparatively advantaged. Hence, according to the criteria of the 1965 comparative *Policy Statement, supra,* we find that a grant of the Superior application will better serve the public interest, convenience, and necessity.

10. ACCORDINGLY, IT IS ORDERED, That the petition for

[6] No exception has been taken to the ALJ's award of a substantial diversification preference to Superior, and any objection to it by Far West is waived. 47 CFR §1.277(a).

[7] Far West excepts to this preference based on its view that Superior has lacked candor in this proceeding and has been unwilling to comply with the Commission's reporting requirements and, therefore—by implication—its integration is qualitatively poor. Because we have not found any intentional lack of candor or willful noncompliance, we reject this argument; Superior has received a comparative demerit for its reporting deficiencies, but its integration credit remains unscathed.

In addition, we have considered herein all of Far West's exceptions having decisional significance. *See* 47 CFR §1.282(b)(2).

leave to amend filed on April 8, 1983 by The Far West Broadcasting Co., Inc. IS GRANTED, and the amendment IS ACCEPTED; and

11. IT IS FURTHER ORDERED, That the application of Jack O. Koonce and Melvin J. Querio d/b/a Superior Broadcasting of California (File No. BPCT-781221LI) IS GRANTED, and the application of The Far West Broadcasting Co., Inc. (File No. BPCT-790815KP) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 83D–6

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| Jack O. Koonce and Melvin J. Querio d/b/a SUPERIOR BROADCASTING OF CALIFORNIA Chico, California | BC Docket No. 80–734 File No. BPCT-781221LI |
| THE FAR WEST BROADCASTING CO., INC. Chico, California | BC Docket No. 80–735 File No. BPCT-790815KP |
| For Construction Permit for New Television Station | |

*Appearances*

*Vincent J. Curtis, Jr.* on behalf of Jack O. Koonce and Melvin J. Querio d/b/a Superior Broadcasting of California; *Herbert D. Miller, Jr.* on behalf of The Far West Broadcasting Co., Inc.; and *Norman Goldstein* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOSEPH P. GONZALEZ

(Issued: January 25, 1983; Released: February 4, 1983)

*Preliminary Statement*

1. This proceeding involves the mutually exclusive construction permit applications of Jack O. Koonce and Melvin J. Querio d/b/a Superior Broadcasting of California (Superior) and The Far West Broadcasting Co., Inc. (Far West) for a new commercial television station to operate on Channel 24 in Chico, California.[1]

2. By Hearing Designation Order released December 1, 1980 (Mimeo No. BC 04104), 45 FR 79904, published December 2, 1980, the Commission, by the Chief, Broadcast Bureau, acting pursuant to

[1] The application of a third party, Southwest Television, Ltd. for the new facility at Chico, California was dismissed with prejudice in a Memorandum Opinion and Order released January 28, 1981 (FCC 81M-271).

delegated authority, designated these applications for hearing in a consolidated proceeding on the following issues:[2]

1. To determine, with respect to Far West:

   a) whether applicant has $1,369,032 available to meet its proposed expenditures;

   b) whether, in light of the evidence adduced pursuant to a) above, the applicant is financially qualified.

2. To determine, on a comparative basis, which of the applications would best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. On January 2, 1981, Far West filed a Motion to Enlarge Issues, requesting the inclusion of the following issues: (1) whether Superior reported all of the broadcast interests and associations of its principals, and if not, the effect on its basic and comparative qualifications; (2) whether Querio violated the Commission's cross-ownership policy by having simultaneous interests in KTXL-TV and KLOC-TV,[3] and whether Superior attempted to conceal this violation, and its effect thereof on its basic and comparative qualifications; (3) whether the grant of Superior's application would result in excessive or increased regional concentration of control, and the effect thereof on Superior's basic and comparative qualifications; and (4) whether Superior would have the signal strength it had proposed, and if not, the effect thereof on its basic and comparative qualifications. In a Memorandum Opinion and Order released July 23, 1981 (FCC 81M-2284), the Presiding Judge granted inclusion of issues (1) and (4), and denied inclusion of issues (2) and (3).

4. In a subsequent Order released December 16, 1981 (FCC 81M-3968), the Presiding Judge indicated that he considered the issue as set forth in (4) above, as no longer relevant to the problem at hand, and it was deleted.

5. On February 12, 1981, Far West filed a Further Motion to Enlarge Issues, petitioning that an issue pertaining to the allegated improper maintenance of KLOC-TV's public inspection file be designated against Superior. Far West also petitioned that a misrepresentation issue be added against Superior. In a Memorandum Opinion and Order released August 13, 1981 (FCC 81M-2509), the Presiding Judge granted inclusion of the first issue, and denied inclusion of the second.

6. The Presiding Judge in a Memorandum Opinion and Order released July 22, 1981 (FCC 81M-2238), granted Far West's Motion

[2] The issues specifically designated against Southwest Television, Ltd. the dismissed applicant, have been omitted.

[3] Station KLOC-TV is now station KCSO-TV. For purposes of clarity, the station will continue to be referred to as station KLOC-TV.

for Partial Summary Decision filed June 9, 1981, and the limited financial issue set forth in 1. a) and b) above was resolved in Far West's favor.

7. Prehearing conferences were held on February 25, 1981, June 23, 1981, October 27, 1981, November 4, 1981 and December 14, 1981. An admissions session was held on March 19, 1982. Hearing sessions were held on March 23, 24 and 25, 1982. The record was held open until receipt of a Joint Stipulation on March 30, 1982, and was closed by Order of the Presiding Judge released April 2, 1982 (FCC 82M-1044). Proposed Findings of Fact and Conclusions of Law were filed by both applicants and the Broadcast Bureau on May 26, 1982, and replies were filed on June 11, 1982.

## *Findings of Fact*

### *Superior Broadcasting of California*

8. Superior Broadcasting of California is a general partnership between Melvin J. Querio and Jack O. Koonce. Each partner owns a 50 percent interest (Tr. 166, 250). Both men reside in California, and upon grant of Superior's application, they both plan to move to the Chico area. Currently, Mr. Koonce resides in Delano, California and Mr. Querio resides in Modesto, California (Superior Exhibits 1 and 3).

### *Jack O. Koonce*

9. Mr. Koonce will be the Chief Engineer and Assistant Manager to Mr. Querio at the Chico TV station. He will be responsible for the hiring and scheduling of the technical staff, and the daily maintenance of all technical equipment and the FCC files. Mr. Koonce proposes to work full time (40 hours per week) at the Chico TV station (Superior Exhibit 1).

10. Mr. Koonce is presently self-employed as a broadcast technical assistant. He is also an Assistant Minister at St. Dunstan's Episcopal Church, Modesto, California. Mr. Koonce attended the Porterville Community College for two years, and the Episcopal Theological School at Claremont, California. While living in Delano, California, Mr. Koonce has served as past President and Board member of the Delano California Elementary School District; past President of Delano Rotary Club; past Director of the Delano Chamber of Commerce; member of the Quarter Century Broadcaster Club; and Council Member of the Diocese of the San Joaquin Episcopal Church of the U.S.A. He also sells real estate and manages his own rental properties (Superior Exhibit 1).

11. Mr. Koonce is currently President and 100 percent stockholder of Koonce Pacific Corporation, a broadcast consulting firm. Mr. Koonce's past media interests are as follows: (1) 50 percent interest in KXEM Radio, McFarland, California (1971–1974); (2) 100 percent

interest in KXEM (1974–1977); (3) 51 percent interest in KXEM (1977–1978); and (4) 100 percent interest in KWIP Broadcasting, Inc., Merced, California (1976–1978). Mr. Koonce has no current broadcast interests. His past work experience has been as follows: (1) General Manager of station KXEM, McFarland, California; (2) freelance work as a contract technician for a number of radio stations; (3) contract First-Class Operator for station KDNO-FM, Delano, California (1968–1969); and (4) contract engineer for station KRTN, New Mexico (5 mos., 1951). In addition, from March 1, 1977 to December 5, 1977, he was President and Director of North America Media, proposed assignee of station KOBY, Reno, Nevada (application dismissed 1978).[4] He was also an announcer and engineer at radio station KTBR, Modesto, California (1955–1956); and a part-time announcer at KTUR radio, Turlock, California (4 mos., 1952) (Superior Exhibit 1).

12. Mr. Koonce has held a First Class Radio Telephone License for more than 30 years, and an Amateur Radio License for 33 years (Superior Exhibit 1).

*Melvin J. Querio*

13. Mr. Querio, in the event that Superior's application is granted, will serve as General Manager of the proposed television station, devoting at least 40 hours per week to his duties at the station. He will be in charge of the daily operation of the station, including programming and sales. Mr. Querio presently resides in Modesto, California, but will relocate to Chico or the immediate Chico area if Superior is awarded the certificate. He is currently the General Manager of KLOC-TV, Channel 19, Modesto, California (Superior Exhibit 3). Mr. Querio has taken a temporary leave of absence from KLOC-TV in order to provide assistance in the coordination and sales planning of stations KLRK-TV, Vancouver-Portland, Oregon and KTMX-TV, Denver, Colorado.[5]

14. Mr. Querio owns 12 percent of the voting stock in KLOC Broadcasting Company, Inc., [6] the licensee of KLOC-TV, Modesto, California and KCBA-TV, Salinas, California and 10 percent owner of station WCPT-TV, Crossville, Tennessee. KLOC Broadcasting was at one time the licensee of KLOC-AM, Ceres, California. In addition, Mr. Querio formerly held a 52 percent interest in KTRT-AM,

[4] Mr. Koonce did not have an ownership interest in Salinas Radio, Inc. or with North America Media, but acted as a manager under the conditions stipulated in the Management Agreement that was negotiated between Koonce Pacific Corporation and KWIP Broadcasting, Inc., KXEM Radio Company, Salinas Radio, Inc. and Ron T. Smith and Nancy E. Smith.

[5] Amendment to Superior's application filed on January 10, 1983.

[6] KLOC Broadcasting Company, Inc. is now Sainte Broadcasting Corporation. For purposes of clarity, however, it will continue to be referred to as KLOC Broadcasting.

Truckee, California (1968–1972). His past broadcast experience is as follows: (1) Transmitter Engineer, Sales Department, and Announcing at station KECC, Pittsburg, California (1953); (2) Sales, station KVON, Martinez, California (1953); Floor Director and Production Supervisor for station KOVR (1954–1965); (4) Operations Manager, KTXL-TV, Sacramento, California (1968–1978), and a member of KTXL Board of Directors (1972–1974); (5) General Manager, KCIK-TV, El Paso, Texas (1978–1980); and (6) General Manager, KLOC-TV, Modesto, California (1980 to present).

*Far West Broadcasting Co., Inc.*

15. Far West Broadcasting Co., Inc., a California corporation, has two stockholders, David E. Caldwell (20 percent owner) and Kelly Broadcasting Co. (80 percent owner) (Far West Exhibit No. 2).

16. In the event that Far West's application is granted, David Caldwell will serve as full-time general manager of the station, overseeing the daily operations of the station. As of the date of the hearing, Mr. Caldwell lived in Chester, California, approximately 55 miles from Chico, but within the service area of Far West's proposed station.[7] He does not propose to move to Chico, but intends to commute daily in his private plane (Far West Exhibit No. 1; Tr. 490).

17. Mr. Caldwell is currently the 100 percent stockholder, an officer and director of Communications By Design, Inc. He has owned this company, which designs and produces independent programming (including sports and educational programming), since 1971. Communications By Design is presently negotiating the development of a closed circuit satellite television network for the Veterans Administration and the Indian Health Service for medical education, diagnostic and therapeutic purposes. Until November 30, 1981, Communications By Design was the licensee of radio stations KBLF-AM and KSNR-FM in Red Bluff, California, and Mr. Caldwell was the general manager of these radio stations. In 1981, stations KBLF-AM and KSNR-FM were assigned to Wireless Associates (Far West Exhibit No. 1). Mr. Caldwell has never been a general manager of a television station, nor has he ever been an employee of a television station (Tr. 477).

*Kelly Broadcasting Co.*

18. Kelly Broadcasting Co., the 80 percent owner of Far West is composed of five partners: Jon S. Kelly and Robert E. Kelly, both of whom own 331;3 percent each of the corporation; Nina N. Kelly (Trustee of the Nina N. Kelly Trust No. 2) which owns 231;3 percent; Robert E. Kelly and Jon S. Kelly (Trustees, Suzanne Kelly Adams Trust) which owns 71;2 percent; and Robert E. Kelly and Jon S. Kelly

[7] By an amendment filed August 18, 1982, the Presiding Judge has been advised that Mr. Caldwell has moved to Quincy, California.

(Trustees of the Carolyn and Walter Adams Trust) which owns $2^1/_2$ percent (Far West Exhibit No. 2).

19. Kelly Broadcasting is the 100 percent owner of KCRA-TV licensed to Sacramento, California. KCRA-TV has extensive audience penetration into Butte County (where Chico is located), as well as the proximate counties of Lake, Sutter, Yuba Nevada, Sierra and Plumas. It is also available on numerous cable television systems serving Butte County (Superior Exhibits 4 and 5).

20. The principal owners of Kelly Broadcasting Co., Robert E. Kelly and Jon S. Kelly, are also equal partners in Kelly Television Co. Kelly Television Co. is the licensee of KCPQ-TV in Tacoma, Washington (Far West Exhibit No. 2).

21. None of the members of Kelly Broadcasting Co. or Kelly Television Co. proposes to perform any duties associated with the management of the proposed television station.

*Special Issues*

*Public File Issue*

22. As noted above, the Presiding Judge in a Memorandum Opinion and Order released August 13, 1981 (FCC 81M-2509), designated a public file issue against Superior. The burden of going forward on the issue was placed on Far West, and the burden of proof on Superior.

23. Far West has failed to demonstrate that Melvin Querio had any responsibility for the maintenance of KLOC-TV's public file at the time William Krum, Far West's agent, asked to inspect the file. The undisputed evidence of record indicates that from April 1980, when Mr. Querio returned to KLOC-TV as general manager, until some time after Mr. Krum's visit, Chester Smith, the 51 percent owner of KLOC-TV, had the responsibility for properly maintaining the public file (Tr. 298–300). Furthermore, Mr. Querio testified that during that period of time he did not review the public file, or in any way have any effect upon the usual maintenance of the file; and that he did not instruct anyone during that period as to proper maintenance procedures (Tr. 299). The Presiding Judge concludes, therefore, that Far West has failed to demonstrate that Mr. Querio had any responsibility for maintaining KLOC-TV's public file at the time of Mr. Krum's visit; and that the responsibility for the improper maintenance of the file cannot therefore be ascribed to Mr. Querio. In view of Far West's failure to submit any evidence to support its contention that Mr. Querio was responsible for the fact that KLOC-TV's public file was incomplete at the time of Mr. Krum's visit, summary decision of the public file issue in Superior's favor is warranted, and it is so ordered.

24. Far West's additional contention that Querio is at fault for failing to instruct the KLOC-TV staff as to the proper maintenance

ownership interest in KLOC Broadcasting while working for KTXL-TV (Tr. 408–409). He added, however, that at the time he could not understand why Far West was alleging a cross-interest problem since in his opinion the stations in question were not competitive, since they served different markets (Tr. 354). Querio remembers discussing the pleading with counsel for Superior, but cannot recall whether they discussed his other roles at KLOC-TV and KTXL-TV (Tr. 355, 363). Their discussions, according to Querio, focused rather on the nature and the programming of these stations, and not on his role at the stations (Tr. 409–410); and that during these discussions, his positions as director of KTXL-TV and as officer and director at KLOC-TV simply did not come to mind because he considered them to be irrelevant, since they were positions in name only (Tr. 269, 289).

29. In its reply to Superior's opposition statement filed February 12, 1981, Far West made the further charge that Superior had failed to report that Querio, in addition to being a 12 percent stockholder, had been vice president and director of station KLOC-TV between 1965–1974 and, it alleged that Superior had demonstrated a lack of candor when it replied in its opposition pleading that Querio had not been an officer or director of KLOC-TV. On February 12, 1981, Far West filed a further motion to enlarge which sought the designation of a misrepresentation issue against Superior on the basis that it had misrepresented the true nature of Querio's connection with KLOC-TV.[9]

30. Querio testified that he discussed Far West's further allegations with counsel, and at the time was aware of his responsibility to report fully past and present media interests. Nevertheless, Querio indicated that his past role as director at KTXL-TV between 1972 and 1974 did not come to mind (Tr. 290–291); and that it was not until he had lunch with a friend, Jack Matranga, in late February or early March 1981, that he remembered that he had also been a director at KTXL-TV (Tr. 378–379).[10]

31. At the hearing, Messrs. Koonce and Querio were shown Superior Broadcasting Company of Texas, Inc.'s amendment filed March 23, 1981 which reported Querio's directorship at KTXL-TV (BC Docket No. 81–225, BPCT-800129KE). Neither Koonce nor Querio had any explanation as to why an amendment to the Chico

[9] The Presiding Judge in a Memorandum Opinion and Order released on August 13, 1981 (FCC 81M-2509), denied the petition on the basis that the failure to disclose issue previously designated against Superior (Memorandum Opinion and Order released on July 23, 1981 (FCC 81M-2284) would include an examination of whether the failure to disclose constituted a misrepresentation.

[10] On April 9, 1981, Superior filed a petition for leave to amend and associated amendment signed by Querio which reported that Querio had been a director of Camelia City Telecasters, Inc., licensee of KTXL-TV, Sacramento, California from January 21, 1972 to July 16, 1974 (Far West Exhibit No. 6).

application was not filed at the same time as the Superior Broadcasting of Texas amendment (Tr. 238, 296). As noted in footnote ten, Superior's amendment reporting Querio's directorship of the licensee of KTXL-TV was not reported until April 9, 1981.

32. Far West argues that, at the very least, Superior has demonstrated a lack of a good faith effort in providing complete and accurate information with respect to its principals' media interests and associations as required by FCC Form 301. It argues, in support of this contention, that the record demonstrates that neither Mr. Querio nor Mr. Koonce made any effort to find out what information was required by FCC Form 301, and that Mr. Koonce made no attempt to verify the completeness or accuracy of the information supplied by Querio.

33. Far West submits, however, that the evidence of record with respect to this issue, warrants Superior's disqualification. It contends that Superior deliberately attempted to minimize a cross-interest problem by withholding pertinent information; and that it failed to timely report, or correctly set forth the nature and extent of Querio's present and past media interests, in a deliberate attempt to gain a comparative advantage. Far West considers it inconceivable that the allegations made in its various pleadings did not refresh Querio's memory as to his past broadcast interests and associations or prompt a discussion of these matters between counsel and Querio which would have resulted in Superior reporting these interests and associations earlier. It submits therefore, that the only credible explanation for Superior's failure to come forward with the information in a timely fashion is that Superior made a conscious decision to proceed by misstatement, omission and concealment.

34. Superior admits that it failed to report certain information with respect to Querio's past media interests in a timely fashion; however, it attributes its failure to do so to Querio's mistaken impression that only current broadcast interests were relevant. It refers, in support of its position to Querio's testimony to the effect that he considered his positions as the president and director at KLOC-TV and director at KTXL-TV as meaningless and ancient history, and to Querio's further statement that he described his KLOC Broadcasting stock as "non-voting" as a carry-over from his earlier agreement not to vote his KLOC-TV stock while employed at KTXL-TV. As further explanation for Querio's characterization of his KLOC stock as "non-voting", Superior refers to Querio's testimony that he cannot remember ever voting his stock, and to his description of KLOC Broadcasting as essentially a one man operation, run by Chester Smith, KLOC Broadcasting's majority stockholder.

35. Superior takes issue with Far West's contention that Querio deliberately withheld information with respect to his position at KLOC-TV and KTXL-TV because of Far West's cross-interest

allegations. It notes that Querio's position as operations manager at KTXL-TV and his stock interest in KLOC Broadcasting were reported to the Commission, and that this was sufficient to raise a cross-interest question. It submits, therefore, that Superior would have had no reason to withhold additional information with respect to other positions held by Querio. Furthermore, it states that Querio's testimony indicates that he was not concerned with these cross-interest allegations since he viewed these stations as serving different broadcast markets with programming geared to different audiences, and for the additional reason that he knew each station was aware of his position with the other station.

36. Superior explains its failure to report the filing of the Salinas application by stating that at the time the application was filed, Querio had been away from KLOC-TV for approximately 10 years and was unaware of its filing. Although Querio was back at KLOC-TV when KLOC Broadcasting received the license for the Salinas station and knew of the grant, Superior notes Querio's testimony to the effect that at the time he did not "focus" on the grant and, therefore, failed to report it timely.

*Discussion and Conclusions*

*Failure to Report Issue*

37. Although Superior's application contained a reference to the Koonce Pacific Corporation, it did not specifically indicate that a management agreement existed between Koonce Pacific Corporation and stations KXES and KOBY-AM, pursuant to which Koonce agreed to assume a management role with the stations. The Presiding Judge is of the opinion, however, that the reference to the management company contained in Superior's application was sufficiently responsive to Section II of FCC Form 301 in view of the tentative nature of these associations; and that Koonce's failure to refer specifically to his past association with stations KXES and KOBY-AM did not constitute a violation of Section 73.3514 of the Commission's Rules. As noted above, Koonce's association with station KXES terminated before the station went on the air, and his association with KOBY-AM was premised on Commission approval of an assignment application which was withdrawn before the Commission had the opportunity to act on the request. The Presiding Judge concludes therefore that Superior's failure to report in detail on Koonce's past association with station KXES and with KOBY-AM does not warrant disqualification or the assessment of a comparative demerit.

38. In the case of Querio's past and present broadcast interests and associations, certain matters of potentially decisional significance were either initially not accurately reported or were not timely disclosed. As noted above, Querio's KLOC Broadcasting stock

was inaccurately described in Superior's application as "non-voting", and Superior failed to timely report the filing of an application for a television station in Concord, California, and the application and grant of KLOC Broadcasting's application for a television license in Salinas, California. In addition, Superior failed to report fully on Querio's past associations with stations KTXL-TV and KLOC-TV as well as his past interest in station KTRT-AM, Truckee, California which ended in January 1972. By failing to timely report the full extent of Querio's past and present broadcast interests and associations, Superior violated Commission Rules 1.65 and 73.3514. The question remaining for consideration here is whether these violations warrant disqualification or the assessment of a comparative demerit against Superior.

39. Far West argues that Superior deliberately sought to conceal the true nature of Querio's past associations with KLOC-TV and KTXL-TV in an attempt to minimize an apparent cross-interest problem, and that this attempt to mislead or conceal warrants disqualification. The Presiding Judge notes, initially, that Superior reported voluntarily in its application that Querio had served as operations manager at KTXL-TV, while at the same time holding 12 percent of the stock in KLOC Broadcasting, the licensee of KLOC-TV; and that Querio's ownership interest in KLOC-TV, while serving as operations manager at KTXL-TV is sufficient to raise a cross-interest question. Withholding the additional information that Querio also held, simultaneously, the positions of director with both KLOC Broadcasting and Camelia City Telecasters, Inc., the licensee of KTXL-TV, as well as vice president of KLOC Broadcasting would, therefore, have served no purpose. Accordingly, the Presiding Judge concludes that the evidence of record fails to show that Superior had any motive to conceal or misrepresent the nature and full extent of Querio's past associations with these stations.

40. Furthermore, the Presiding Judge finds that Querio's testimony, which the Presiding Judge found credible, supports the conclusion that his failure to report the extent of his past broadcast interests and associations as well as the true nature of his ownership interest in KLOC Broadcasting was not due to a desire to conceal and mislead, or to gain a comparative advantage, but was simply due to a mistaken impression of what information was required or relevant. Querio's testimony to the effect that he considered his unreported positions at KTXL-TV and KLOC-TV to be insignificant is supported by the fact that he resigned these positions unquestioningly. Similarly, his description of his KLOC stock as "non-voting", although not accurate, is indicative of his attitude towards his voting rights which he considered meaningless in view of the fact that he had agreed not to vote the stock, cannot remember ever voting the stock, and viewed KLOC Broadcasting as essentially a one man operation run by its majority stockholder.

41. By failing to fully and accurately report Querio's past and present broadcast interests, Superior violated Sections 1.65 and 73.3514 of the Commission's Rules. The Presiding Judge finds, however, that the facts which were not timely reported are of little or no decisional significance. Querio's 52 percent interest in the licensee of station KTRT-AM, Truckee, California which ended in 1972, and KLOC Broadcasting's application for a Concord, California television station which was withdrawn, are of no decisional significance. Querio's minority interest, i.e., 12 percent of the voting stock in KLOC Broadcasting, the licensee of a television station located in Salinas, California, approximately 200 miles from Chico, is of only very slight decisional significance. Similarly, the fact that his stock interest in KLOC Broadcasting is voting rather than non-voting is of only very slight decisional significance in view of Querio's minority status. Querio's past positions as vice president and director of KLOC Broadcasting and director of Camelia City Telecasters, Inc., the licensee of station KTXL-TV, Sacramento, California are of no decisional significance.

42. The Presiding Judge concludes that there has been no showing of an intent to conceal or deceive on the part of Messrs. Querio or Koonce; and that Superior's failure to timely and accurately report information with respect to its principals' broadcast interests and associations was due to faulty judgment. In view of this finding and the finding that the matters not timely or accurately reported are, at the very most, of only slight decisional significance, the Presiding Judge concludes that neither disqualification of Superior, nor the assessment of a comparative demerit against Superior are warranted. See *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944 (Rev. Bd. 1982); *Merrimack Valley Broadcasting, Inc.*, FCC 82R-71, released December 8, 1982.

43. The Bureau urges the Presiding Judge to assess a substantial comparative demerit against Superior on the basis that Superior's failure to timely and accurately report the past broadcast interests and associations of its principals does not bode well for Superior's ability and/or willingness to comply with the Commission's Rules and Regulations in the future. In this instance, however, the information which was omitted or misstated is, at the very most, of only slight decisional significance, and Superior's failure to report the information fully and accurately has been found to have been due to an honest misunderstanding of the Commission's reporting requirements. The Presiding Judge believes that there is no reason to feel that in the future Superior will not make every effort to inform itself of the pertinent rules and regulations of the Commission and operate the station in conformity with these rules and regulations. The Bureau's request will be denied.

*Comparative Issues*

*Diversification of Ownership*

44. As noted above, Superior is owned in equal shares by Messrs. Koonce and Querio. Superior and Mr. Koonce have no media interests; however, Mr. Querio owns 12 percent of the voting stock in KLOC Broadcasting, the licensee of station KCBA-TV, Salinas, California, station KLOC-TV, Modesto, California, and station KLOC-AM, Ceres, California.[11] In addition, KLOC Broadcasting owns a 10 percent interest in WCPT-TV, Crossville, Tennessee.

45. Far West has no media interests. Kelly Broadcasting which owns 80 percent of Far West, owns 100 percent of KCRA-TV, Sacramento, California, and two of Kelly Broadcasting's principals are equal owners of Kelly Television Co., the licensee of KCPX-TV, Tacoma, Washington. Mr. Caldwell, who owns the remaining 20 percent of Far West, at present has no other media interests.[12]

46. The Presiding Judge considers KLOC Broadcasting's 10 percent interest in station WCPT-TV, Crossville, Tennessee to be of no decisional significance, in view of the station's considerable distance from Chico and Querio's extremely limited interest. The Presiding Judge further finds Querio's interest in KLOC-TV and the Salinas permit to be of only slight decisional significance in view of Querio's minority stock interest in KLOC Broadcasting, the licensee and permittee of these stations, and the absence of any evidence indicating that these stations have any audience penetration in the Chico area.

47. In contrast, Far West's majority and controlling stockholder, Kelly Broadcasting Co., is the 100 percent owner of station KCRA-TV, Sacramento, California, which has extensive over-the-air and cable audience penetration in the Chico area. In view thereof, the Presiding Judge finds that Kelly Broadcasting's interest in station KCRA-TV, Sacramento, California, is significant, and entitles Superior to a substantial diversification preference over Far West, since the controlling principal of Far West already has a voice in the Chico

[11] KLOC Broadcasting divested itself of KLOC-AM, Ceres, California on April 6, 1981, four months after the designation of the above-entitled matter for hearing. Accordingly, for comparative purposes, KLOC Broadcasting is still considered to be the licensee of KLOC-AM, Ceres, California.

[12] Far West's unopposed amendment reporting the sale of KBLF-AM and KSNR-FM by Mr. Caldwell's company, Communications By Design, Inc. was accepted on December 31, 1981 (FCC 81M-4132). Since Far West represented in its application filed August 15, 1979 that the stations would be sold, they are not attributable to Far West in this proceeding. See *Alexander S. Klein, Jr.*, 69 FCC 2d 2134 (Rev. Bd. 1978).

area. See *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526 (Rev. Bd. 1976).

*Integration of Ownership*

48. Superior proposes to have both equal partners work full time at the proposed station. Mr. Querio will be general manager and Mr. Koonce will be the chief engineer and assistant manager. Both positions are of the required degree of responsibility to warrant integration credit, and Superior, therefore, is entitled to a 100 percent quantitative integration credit. Far West proposes to integrate full time as general manager its 20 percent owner David E. Caldwell. Far West is therefore entitled to a 20 percent quantitative integration credit. See *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

49. In view of the 80 percent difference between the quantitative integration credits of the two applicants, the Presiding Judge does not consider it necessary to reach a conclusion as to whether either applicant is entitled to a qualitative enhancement of its integration credit, since it is well established that qualitative enhancements cannot overcome a clear quantitative difference. See *Radio Gaithersburg, Inc.*, 72 FCC 2d 820 (Rev. Bd. 1979); and *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 (Rev. Bd. 1982).

50. Accordingly, the Presiding Judge finds that Superior is entitled to a substantial diversification credit as well as a substantial integration preference over Far West; and that in view thereof, it is the Presiding Judge's conclusion that Superior's proposal will provide the best practicable service to the public, and Superior will therefore receive the permit for the new television station on Channel 24 in Chico, California.

*Rulings*

51. IT IS ORDERED that the unopposed Motion for Leave to Amend filed by Jack O. Koonce and Melvin J. Querio d/b/a Superior Broadcasting of California on January 10, 1983 IS GRANTED, and the amendment IS ACCEPTED.

52. AND IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Jack O. Koonce and Melvin J. Querio d/b/a Superior Broadcasting of California (BC Docket No. 80–734, File No. BPCT-781221LI) for a construction permit to operate a new television station on Channel 24 in Chico, California IS GRANTED; and the application of Far West Broadcasting Co., Inc. (BC Docket No.

80–735, File No. BPCT-790815KP) IS DENIED.[13]

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH P. GONZALEZ, *Administrative Law Judge*

[13] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Application, Dismissal of

Review Board affirms ALJ's dismissal of application where applicant proposed a major change to its application within the meaning of Section 73.3572(a)(1).
–*Trefoil Broadcasting Co., Inc.*
MM Docket No. 83–61

FCC 83R–54

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| In re Applications of | |
|---|---|
| TREFOIL BROADCASTING COMPANY, INC.<br>Sacramento, California | MM Docket No. 83–61<br>File No. BPCT-820614KG |
| Louis F. Garcia, et al d/b/a<br>SACRAMENTO TELEVISION ASSOCIATES, LTD.<br>Sacramento, California | MM Docket No. 83–62<br>File No. BPCT-820816KG |
| CAPITAL HISPANIC BROADCASTERS, INC.<br>Sacramento, California | MM Docket No. 83–63<br>File No. BPCT-820824KF |
| DO DECCA ECKTRON CORPORATION<br>Sacramento, California | MM Docket No. 83–64<br>File No. BPCT-820824KG |
| ROYCE INTERNATIONAL BROADCASTING COMPANY<br>Citrus Heights, California | MM Docket No. 83–65<br>File No. BPCT-820824KH |
| DELTA BROADCASTING COMPANY, INC.<br>Sacramento, California | MM Docket No. 83–67<br>File No. BPCT-820824KK |
| PONCE-NICASIO BROADCASTING, A LIMITED PARTNERSHIP<br>Sacramento, California | MM Docket No. 83–68<br>File No. BPCT-820824KN |

| | |
|---|---|
| EL DORADO TELEVISION COMPANY<br>Sacramento, California | MM Docket No. 83–69<br>File No. BPCT-820824KP |
| ALDEN COMMUNICATIONS CORP.<br>Sacramento, California | MM Docket No. 83–70<br>File No. BPCT-820824KV |
| SACRAMENTO ENTERTAINMENT TELEVISION CORPORATION<br>Sacramento, California | MM Docket No. 83–71<br>File No. BPCT-820824KW |
| CHANNEL 29 INVESTORS, A LIMITED PARTNERSHIP<br>Sacramento, California | MM Docket No. 83–72<br>File No. BPCT-820824KX |

For Construction Permit:

MEMORANDUM OPINION AND ORDER

(Adopted: August 18, 1983; Released: August 23, 1983.)

BY THE REVIEW BOARD: BOARD MEMBER BLUMENTHAL ABSENT.

1. On June 22, 1983, Royce International Broadcasting Company appealed from the presiding Administrative Law Judge's Memorandum Opinion and Order (FCC 83M-1951), released June 15, 1983, which denied two petitions for leave to amend filed by Royce and granted a competing applicant's motion to dismiss Royce's application with prejudice. For the reasons set out below the Board will affirm the ALJ's action.

2. *Background.* Royce's original application failed to contain complete engineering information regarding its antenna site. Royce later filed an incomplete pre-designation amendment on October 20, 1982 in which it specified a new antenna site. Certain technical information called for by the application was again omitted from the amendment. The Hearing Designation Order noted that the Commission staff could not evaluate the applicant's technical proposal in the absence of the required data and directed Royce to submit such information to the presiding Administrative Law Judge (ALJ) by March 24, 1983. Hearing Designation Order, 48 Fed. Reg. 7496, published February 22, 1983. Royce, which was then proceeding *pro se*, timely submitted the engineering information but misdirected it to the Mass Media Bureau. Following the retention of counsel, Royce filed the amendment and a petition for leave to amend with the ALJ on April 21, 1983.

3. On May 2, 1983, Ponce-Nicasio Broadcasting, one of ten

competing applicants, filed a motion to dismiss Royce's application, contending that Royce's April 21 amendment proposed a major change to its application within the meaning of Section 73.3572(a)(1) of the Commission's Rules since it enlarged its Grade B contour by more than 50%, and that Royce's application must therefore be removed from the hearing docket and returned to the processing line for the assignment of a new file number as required by Section 73.3572(b) of the Rules.[1] Royce, in opposition, claimed that it had overstated the size of its Grade B contour in its April 21 amendment by 866 square miles and that the actual gain in Grade B area over that originally proposed was only 45.26%, which is less than that required to constitute a major amendment. Royce filed a second amendment May 20, 1983 to provide the correct information. Based on the data contained in Royce's opposition, Ponce-Nicasio in its reply submitted the affidavits of two engineers which pointed out errors in Royce's calculations of the area encompassed by the original Grade B contour and noted that the coverage change exceeded 50% even using the figures supplied for the new Grade B area by Royce in its opposition. One of the affidavits also stated that the reasons given by Royce for the overstated figures did not explain the differences in the sizes of its Grade B contour shown in the April 21 and May 20 amendments. Royce's sole owner, Edward Stolz, prepared the engineering section for the application as filed and for the April 21 amendment. A consulting engineer was retained when Royce filed its opposition to the motion to dismiss and the May 20 amendment. The Mass Media Bureau filed comments on June 3, 1983, agreeing with Ponce-Nicasio's engineering analysis and supporting dismissal of Royce's application from the hearing.

4. *ALJ's Ruling and Appeal.* The ALJ granted the motion to dismiss, denied both petitions for leave to amend, and dismissed Royce's application with prejudice. In so doing, he found that the proposed changes would result in a major amendment of Royce's technical proposal, that its excuse for late filing was unacceptable, and that the applicant has not supplied good cause for making the changes it now presents. FCC 83M-1951, *supra*, paras. 9–12. Both the denial of its petitions for leave to amend and the dismissal of its application are challenged by Royce in its appeal. It asserts that good cause existed for acceptance of the amendments and that the ALJ could not dismiss its application without a full hearing since the affidavits are in conflict as to whether a major change occurred. Additionally, by dismissing its application, Royce claims, the ALJ contravened the Commission's policies favoring a choice between

[1] Section 73.3572(b) provides that a new file number will be assigned to an application for a new station when it is amended so as to effect a major change, which includes any engineering changes resulting in a gain or loss of 50% or more of the area within the Grade B contour of the station. See also Section 73.3572(a)(1).

applicants (*see Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 29, 52 RR 2d 63, 65 (Rev. Bd. 1982)) or communities under Section 307(b) of the Communication Act (*see Mobile Broadcasting Service, Inc.*, 91 FCC 2d 1209, 52 RR 2d 670 (1982)). In any event, Royce argues, the ALJ should have at least permitted it the opportunity to withdraw its pre-designation amendment before dismissing its application, citing *Grace Missionary Baptist Church*, 80 FCC 2d 330, 337, 48 RR 2d 129, 135 (1980).

5. *Disposition.* The Board will deny the appeal. Royce's initial contention that good cause existed for acceptance of the amendments is not persuasive. Although as a general rule, the acceptability of a post designation amendment depends upon whether good cause has been demonstrated (see Section 73.3522(b); and *California Broadcasting Corp.*, 90 FCC 2d 800, 808, 51 RR 2d 1539, 1545 (1982)), that principle is not really pertinent here since the crucial amendment specifying the new site was filed prior to designation and was thus governed by Section 73.3572, which requires the return of an application to the processing line whenever a major change has occurred. See n. 1, above. Moreover, the post designation submissions were primarily clarifications of the pre-designation amendment. Thus the central question before us is the propriety of the ALJ's dismissal of Royce's application, whether or not he accepted its amendments. We believe the ALJ was correct in reaching his result.

6. First, we are unpersuaded by Royce's argument that the ALJ could not dismiss its application without holding a trial type hearing. The question of the acceptability of Royce's application could have been dealt with by the processing line without a hearing, if Royce had disclosed all the facts at the time of the pre-designation amendment. That the facts were not fully known was due solely to Royce's neglect in supplying all of the pertinent data. In this regard, we agree with the ALJ that Royce's clarifying information filed April 21 and May 20 demonstrated on its face that a major change in its application had occurred. Thus, although Royce's Grade B contour was reduced somewhat by its May amendment from that represented in the April amendment, nevertheless, the responsive affidavits of Ponce-Nicasio's two engineers showed that Royce's calculations of the original Grade B contour were incorrect and that a major change had occurred even using the reduced Grade B contour figures. While Royce argues that it could not respond to these affidavits since they were contained in a reply pleading, it never sought leave from the ALJ to respond and does not now on appeal seek to challenge the affidavits either. Moreover, the Mass Media Bureau, with the benefit of its own engineering expertise, reviewed the Ponce-Nicasio engineering analysis and concurred in its findings. The Bureau also pointed out that had all the facts been supplied by Royce at the pre-designation stage, the original October 20, 1982 amendment (as clarified on April 21 and May 20, 1983)

would not have been acceptable. In light of the above, we cannot fault the ALJ's conclusion that the applicant effected a major change in its application.

7. Nor do we discern any merit in Royce's contentions that dismissal of its application contravenes the Commission's policies favoring a choice between applicants, or, between communities under Section 307(b). The Commission's policy favors a comparative choice only among those applicants who have established their basic qualifications to be licensees. *See Midwest St. Louis, Inc.*, 79 FCC 2d 519, 531, 48 RR 2d 95, 105 (1980). This Royce has not done. Furthermore, the public would not be deprived of a choice in this case because there are ten other applicants who are competing for the facility. And with respect to 307(b), Royce's reliance on *Mobile Broadcasting Service Inc., supra*, is misplaced. That case only stands for the proposition that where the choice-of-communities objective of Section 307(b) would be impeded by the dismissal of an application through a settlement agreement, a further opportunity should be afforded for other persons to apply for that other community. *See* Section 73.3525(c)(1) of the Rules. It does not prevent the dismissal of any application. Even if there were such a rule or policy in nonsettlement Section 307(b) cases, and we are aware of none nor has Royce cited such a rule or policy, it would not prevent the return of Royce's application.

8. Finally, we disagree with Royce that under *Grace Missionary Baptist Church, supra*, the ALJ was required to afford it an opportunity to withdraw its pre-designation amendment before dismissing its application. In *Grace*, an applicant was given an opportunity to withdraw an amendment that would have resulted in the dismissal of its application because the amendment appeared to be governed by inconsistent Commission guidance. The Commission cited *Bamford* v. *F.C.C.*, 535 F.2d 78, 82 (D.C. Cir. 1976) for the proposition that "elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected" and concluded that the potential for confusion was a sufficient basis for not dismissing the application. The Commission also noted that the disputed amendment had been misplaced and that had it not been, the Bureau would also have permitted an opportunity for withdrawal. Here, however, there was no confusion with respect to the Commission's standards and no misplaced amendment. Rather, any confusion resulted from Royce's own derelictions. Furthermore, Royce's request to withdraw its amendment comes too late because it has been on notice from the time of designation that its proposal for a new site required more information before it could be evaluated. At that time, Royce could have sought to withdraw its October 20, 1982 amendment. It did not. Instead it opted to pursue the new site and continued to do so even after it had been confronted by Ponce-Nicasio. In any event, even if Royce were permitted to withdraw its

amendment now, we would still not have assurance of its technical qualifications since the information regarding the site proposed in its original application was also incomplete. See para. 2, above.

9. In sum, we affirm the dismissal of Royce's application. To do otherwise and to allow Royce to continue in this proceeding would be to condone its pre-designation neglect and post designation fumblings, which cloaked a major change in its application to the comparative detriment of the other parties. This is the third time in five months that we have had to consider serious application deficiencies involving Mr. Stolz, the sole owner of Royce, that appear to result from a lack of attentiveness to his filings with the Commission, unfamiliarity with our rules and policies, refusal to obtain (or benefit from) adequate legal and engineering advice, and possibly worse. *See George E. Cameron Jr. Communications*, 53 RR 2d 917 (Rev. Bd. 1983), *Shoblom Broadcasting, Inc.*, 53 RR 2d 1203 (Rev. Bd. 1983). This agency need not and can not indulge an applicant who continually fails to submit basic information in an orderly fashion, especially where, as here, ten other applicants are waiting for a hearing to decide which one is entitled to the one available channel and the public is waiting for service.

10. ACCORDINGLY, IT IS ORDERED, That the appeal filed June 22, 1983 by Royce International Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

Contour, Overlap
Remand

Proceeding remanded because factual basis upon which ALJ relied in granting applications and terminating proceeding was incorrect.
*–Trio Broadcasters, Inc.*
BC Docket No. 82–701

FCC 83R–48

**BEFORE THE**

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| TRIO BROADCASTERS, INC.<br>WMOO, Fairhope, Alabama | BC Docket No. 82–701<br>File No. BP-810309AN |
| ED WINTON<br>WWLF, Kenneth City, Florida | BC Docket No. 82–702<br>File No. BP-810622AE |
| HOLT-ROBINSON OF MISSISSIPPI, INC.<br>Ridgeland, Mississippi | BC Docket No. 82–703<br>File No. BP-810622AB |
| For Construction Permit | |

MEMORANDUM OPINION AND ORDER

(Adopted: July 5, 1983; Released: July 8, 1983)

BY THE REVIEW BOARD:

1. This proceeding involves the applications of: (a) Trio Broadcasters, Inc. (Trio), licensee of AM station WMOO, Mobile, Alabama, which seeks authority, *inter alia*, to relocate WMOO's city of license to Fairhope, Alabama; (b) Ed Winton (Winton), licensee of AM station WWLF, St. Petersburg, Florida, which seeks permission, *inter alia*, to move WWLF's city of license to Kenneth City, Florida; and (c) Holt-Robinson of Mississippi, Inc. (Holt-Robinson), which seeks authority to construct a new AM station in Ridgeland, Mississippi. The applications, which were deemed to be mutually exclusive since Trio's proposed signal strength contours overlap with those of both Holt-Robinson and Winton in violation of Section 73.37

of the Commission's Rules, 47 CFR 73.37, were designated for consolidated hearing on, *inter alia*, Section 307(b) and contingent comparative issues. Hearing Designation Order, Mimeo No. 039, released October 6, 1982. Harte-Hanks Radio, Inc. (Harte-Hanks), licensee of station WRBQ(FM), Tampa, Florida, which filed a petition to dismiss or deny Winton's application, was made a party to the proceeding.

2. Prior to the commencement of hearing, on November 30, 1982, each of the applicants filed an amendment to the engineering portion of its application purportedly designed to eliminate the electrical conflicts and mutual exclusivity among the three proposals. Thereafter, each applicant filed a separate request for severance of its application from the consolidated comparative hearing, deletion of the issues, and grant of its application. Finally, on December 9, 1982, the three applicants filed a joint request for approval of agreement which contemplated the above engineering amendments and provided that each applicant operate its facility to remove interference among the proposed stations. In a Memorandum Opinion and Order released on March 24, 1983 (FCC 83M-941), presiding Administrative Law Judge Tierney (ALJ) approved the proposed agreement, accepted the respective amendments, severed each application from this proceeding, deleted the issues as moot, and granted all three applications.

3. This proceeding is now before the Review Board on an appeal from the ALJ's Memorandum Opinion and Order filed by Harte-Hanks on April 25, 1983.[1] So far as is pertinent here, Harte-Hanks contends that the tendered amendments to the applications of Winton and Trio fail to establish that the overlap of their respective 0.5 and 0.025 mV/m signal contours, which is prohibited by Section 73.37(a) of the Commission's Rules, has been eliminated. Trio, in an opposition to the appeal, does not address the question of whether there is overlap but argues instead that it is proceeding under Section 73.37(b), which permits the grant of an application notwithstanding such overlap where, *inter alia*, the applicant is or would be the first AM broadcast station in a community such as Fairhope. Harte-Hanks points out in its reply brief, however, that Fairhope already has an AM station licensed to it and that Section 73.37(b) is therefore inapposite. It urges the Board to remand the case for a comparative hearing between Trio and Winton. The Board also has before it a motion for oral argument filed by Harte-Hanks on May 23, 1983, and an unopposed motion filed by Holt-Robinson on May 18, 1983, urging the Board to dismiss Harte-Hanks' appeal insofar as it relates to Holt-Robinson. The Mass Media Bureau, in an opposition

[1] Harte-Hanks' appeal, while dated April 25, was actually received by the Commission's Secretary on April 26, one day late. However, Harte-Hanks has filed a motion for acceptance of appeal and has shown good cause; we will therefore grant its motion and accept its appeal.

to the motion for oral argument, concedes that remand of the case is necessary since its prior belief that Section 73.37(b) was controlling, based on a representation by one of the parties that Fairhope had no local station, is not accurate. The Bureau points out that objectionable interference under Section 73.37(a) will exist among the stations and that the applications cannot all be granted.

4. We concur with Harte-Hanks and the Mass Media Bureau that the ALJ's Memorandum Opinion and Order must be vacated and the case remanded to him for further proceedings. It is clear from the pleadings and a review of the November 30 amendments that the factual basis upon which the ALJ relied in granting the applications was incorrect (see Memorandum Opinion and Order, paras. 4, 10); *i.e.*, that Section 73.37(b) was controlling, that the mutual exclusivity of the applications had been eliminated, and that the Section 307(b) and comparative issues were therefore mooted. The engineering statements of Holt-Robinson and Winton contained in the amendments reflect that both applicants' 0.5 and 0.025 mV/m contours continue to overlap with those of Trio in violation of Section 73.37(a), which, since Trio would not be the first AM facility licensed to Fairhope, therefore applies. Since the applications are still mutually exclusive and not all can be granted, remand of the proceeding is necessary.

5. We will also deny Holt-Robinson's motion requesting that we affirm the ALJ's severance and grant of its application. Although no one has addressed this matter and Harte-Hanks simply urges remand of Winton and Trio's applications for comparative hearing, severance and grant of Holt-Robinson's application would, under a strict reading of Section 73.37(a), have the effect of precluding Trio from obtaining a grant even if it were comparatively superior to Winton, since Trio's 0.5 and 0.025 mV/m contours overlap with those of Holt-Robinson, and Trio cannot meet the exception under Section 73.37(b). Severance and grant of Holt-Robinson's application, therefore, would make the remand a charade. However, the converse is not true: Holt-Robinson's application could apparently be granted notwithstanding the above overlap with Trio, if Trio's application were already granted, since Holt-Robinson's proposal to be the first AM station in Ridgeland, Mississippi apparently meets the exception of Section 73.37(b). Thus, the number of the applications that can be granted here appears to depend on the sequence of the grants, an anomalous situation perhaps not contemplated by Section 73.37. In any event, it is preferable to permit the ALJ to consider the question of severance of Holt-Robinson's application based on further pleadings from the parties. We note in passing that the pleadings of all parties both before the ALJ and the Board left much to be desired. Accordingly, in light of the esoteric nature of the rules in question and the confusion that already exists concerning the engineering showing necessary to eliminate the mutual exclusivity of the

proposals, the Board recommends that the ALJ consider meeting with the parties before the commencement of evidentiary hearings to explore precisely what the controlling engineering and legal standards are and how they may be met by the applicants. *Cf. GSM Media Corp.*, FCC 83R-29, 53 RR 2d 1207 (Rev. Bd. 1983).

6. ACCORDINGLY, IT IS ORDERED, That the motion for acceptance of late-filed appeal and the motion for leave to file supplement to motion for acceptance of late-filed appeal, filed April 26 and May 24, 1983, respectively, by Harte-Hanks Radio, Inc. ARE GRANTED; and

7. IT IS FURTHER ORDERED, That the motion to schedule oral argument, filed May 23, 1983, by Harte-Hanks Radio, Inc. and the motion for dismissal of appeal, severance and grant, filed May 18, 1983 by Holt-Robinson of Mississippi, Inc. ARE DENIED; and

8. IT IS FURTHER ORDERED, That the appeal filed April 25, 1983 by Harte-Hanks Radio, Inc. IS GRANTED, that Memorandum Opinion and Order, FCC 83M-941, released March 24, 1983, IS VACATED, and that this matter is REMANDED for further proceedings in accordance with this opinion.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

Disclosure, Candid
Misconduct
Past Performance
Programming, Specialized
Renewal, Applicant vs. New Applicant

Review Board affirms grant of challenger's application in a comparative FM renewal proceeding. Incumbent is not awarded a renewal expectancy and receives a substantial comparative demerit on past misconduct. Losing competing applicant achieves slight specialized program format preference for first nighttime Spanish programming and slight reporting demerit for uncandid application answer.
–*United Broadcasting Company, Inc.*
BC Docket No. 80–479

FCC 83R–55

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| UNITED BROADCASTING COMPANY, INC.<br>Washington, D.C. | BC Docket No. 80–479<br>File No. BRH-589 |
| For Renewal of License of<br>Station WOOK(FM),<br>Washington, D.C. | |
| DISTRICT BROADCASTING COMPANY<br>Washington, D.C. | BC Docket No. 80–480<br>File No. BPH-790831AY |
| HISPANIC BROADCASTING CORPORATION<br>Washington, D.C. | BC Docket No. 80–481<br>File No. BPH-780901AB |
| For Construction Permit | |

*Appearances*

*Thomas Schattenfield*, *David Tillotson*, and *Robert S. Koppel*, on behalf of United Broadcasting Company, Inc.; *Lewis I. Cohen*, *Morton L. Berfield*, and *Roy W. Boyce*, on behalf of District Broadcasting Company; *Lawrence J. Bernard, Jr.*, on behalf of Hispanic Broadcast-

ing Corporation; and *Charles E. Dziedzic*, *Norman Goldstein*, and *Stephen Yelverton*, on behalf of The Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: July 29, 1983; Released: August 24, 1983.)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD:

1. This proceeding involves the application of United Broadcasting Company, Inc. (United) for renewal of license of Station WOOK(FM), Washington, D.C., and the mutually exclusive applications of District Broadcasting Company (District) and Hispanic Broadcasting Corporation (Hispanic) for authority to construct a new FM broadcast station in Washington, D.C. on the frequency now occupied by WOOK(FM). By Memorandum Opinion and Order, 81 FCC 2d 227, 48 RR 2d 429 (1980), the Commission designated these applications for hearing on the standard comparative issue only, cautioning, however, that it was reserving jurisdiction to consider what effect past misconduct at certain of United's other stations should have on that applicant's basic and/or comparative qualifications in this proceeding. 81 FCC 2d at 229, 48 RR 2d at 431. The Commission also stated that evidence could be adduced under the standard comparative issue concerning need for the Spanish-language programming format proposed by Hispanic upon a threshold showing to the Administrative Law Judge that the format would be specialized and unique. 81 FCC 2d at 231, 48 RR 2d at 432.

2. In a subsequent Memorandum Opinion and Order, the Commission considered the question of United's misconduct at other stations, and, focusing on its denial of license renewals for United's Stations WOOK(AM), Washington, D.C., and WFAB, Miami, Florida in prior Decisions,[1] it specified an issue to determine the effect of the findings and conclusions in those cases on United's basic and/or comparative qualifications in this proceeding. 86 FCC 2d 452, 49 RR 2d 597 (1981). Presiding Administrative Law Judge Frederic J. Coufal (ALJ) also specified an issue against United to determine the effect on its qualifications of later misconduct, involving two contests broadcast by WOOK(FM) during 1977–78 (which resulted in the imposition of a $6,000 forfeiture against United),[2] and an issue against Hispanic involving a potential Section 73.3514 reporting violation. See, respectively, Memorandum Opinion and Order, FCC

[1] *United Television Co. (WOOK(AM))*, 55 FCC 2d 416, 34 RR 2d 1465 (1975), *recon. denied*, 59 FCC 2d 663 (1976), *aff'd sub nom. United Broadcasting Co.* v. *FCC*, 569 F. 2d 699 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1046 (1978); *United Broadcasting of Florida (WFAB)*, 55 FCC 2d 832, 35 RR 2d 119 (1975), *recon. denied*, 60 FCC 2d 816 (1976).

[2] Notice of Apparent Liability, FCC 78–838, November 30, 1968.

81M-1614, released May 26, 1981; Memorandum Opinion and Order, FCC 81M-746, released March 13, 1981.

3. In an Initial Decision (I.D.), FCC 82D-73, released November 9, 1982, the ALJ found all three applicants basically qualified and granted District's application under the standard comparative issue. In so doing, he concluded initially that United's past broadcast record, generally the most significant criterion in comparative renewal proceedings, was minimal and that United was therefore not entitled to a renewal expectancy. I.D., paras. 113–114. This conclusion was based, in part, on a substantial demerit given United for its previous misconduct at WOOK(AM) and WFAB, and, in part, on a finding that WOOK(FM)'s performance was substantial only after United realized that renewal of its licenses was in jeopardy. *Id.*, para. 114. District's proposal was found to be comparatively superior to United's on the diversification and integration criteria and to Hispanic on the integration criterion. The ALJ also awarded District minor credit for its proposed auxiliary power supply. Hispanic was not given any preference for its proposed Spanish-language programming format, nor was it assessed any demerit under the reporting issue.

4. This proceeding is now before the Review Board on exceptions filed by United and Hispanic and protective exceptions filed by District. Reply briefs were filed by all three applicants and the Mass Media Bureau. The Board has reviewed the I. D. in light of the exceptions and briefs, the oral argument held May 6, 1983, and our examination of the record. We adopt the findings of fact in the Initial Decision, except as modified herein, and affirm the ALJ's ultimate conclusion that grant of District's application will best serve the public interest, convenience, and necessity.

5. *Background; Relevant Renewal Period.* Richard Eaton was the founder of United and, until his death on June 1, 1981, was its sole stockholder, president, treasurer, and chief executive officer. The station now bearing the call sign WOOK(FM)[3] was first licensed to United on February 5, 1951; however, it was last renewed in 1966. The Commission deferred WOOK(FM)'s 1969 renewal application because of operational problems occurring at some of United's other stations, and United therefore filed supplemental renewal applications every three years beginning in 1972 and ending in 1978. The instant proceeding was initiated on September 30, 1980, before WOOK(FM)'s 1981 supplemental application was due.

6. At hearing, the ALJ rejected United's view that the only license period relevant to this proceeding is WOOK(FM)'s latest renewal period, 1975–1978. Tr. 467–476. Instead, he held that

[3] Prior to December 24, 1976, the station was identified as WFAN(FM) and broadcast in the Spanish language. On that date it switched to a Black format and became WOOK(FM). To avoid confusion we will use the call sign WOOK(FM), even when referring to the station's pre-December 1976 broadcast record.

WOOK(FM)'s performance over the entire period from 1966 through 1978 would be considered. United excepts to this conclusion (although it argues that its performance was substantial in 1966–1975, as well as in 1975–1978). We agree with the ALJ that the relevant renewal period for this proceeding is 1966–1978. It is well established that renewal applicants must literally run on their records. *See Office of Communications of the United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966). And it is a bedrock principle that a license may not be renewed until a determination is made that a grant of renewal would serve the public interest, convenience and necessity. 47 U.S.C. 307(d), 309(a). Thus, since the Commission's last renewal determination for WOOK(FM) was made in 1966, it appears not only reasonable but by operation of law that WOOK(FM)'s entire operating record since then is relevant and open to scrutiny here. *See Intercontinental Radio, Inc.*, 90 FCC 2d 935 (Rev. Bd. 1982).[4] As to United's argument that it is unfair to require it to present evidence concerning programming broadcast 15 years earlier because of the difficulty of compiling such evidence, the licensee has been on notice since 1969 that its application was being held in abeyance and could (and should) have taken appropriate precautionary steps to ensure that the relevant documentation was retained. All that is required is that an applicant make a reasonable, good faith effort to establish its past broadcast record. *Cf. International Radio, Inc.*, *supra*, Nor is the precedent cited by United, *WHCN, Inc.*, 31 FCC 2d 811, 20 RR 2d 894 (Rev. Bd. 1970); *WPIX, Inc.*, 22 RR 2d 1043 (ALJ 1971); *RKO General, Inc.*, 35 FCC 2d 100, 24 RR 2d 411 (1972); and *Hampshire County Broadcasting Co., Inc.*, 50 RR 2d 626 (ALJ 1981), in support of its contention, apposite. None of those cases involved a licensee whose renewal application was deferred beyond the regular license period, and *Hampshire County* did not involve a renewal applicant at all. Rather, *WHCN*, *RKO General*, and *WPIX* all stand for the proposition that post-renewal term upgrading will not be considered when evaluating a licensee's past performance.

7. *Qualifying Issues Against United: (1) Misconduct at WOOK(AM) and WFAB and (2) Misconduct at WOOK(FM).* Before we may comparatively analyze the three applications in this proceeding, we must first determine whether United is basically qualified to be the licensee of WOOK(FM), in light of its previous misconduct at WOOK(AM), WFAB, and WOOK(FM). See paragraph 2, *supra*. In considering these matters, the Commission and the ALJ instructed that the doctrine of collateral estoppel would apply, to

[4] We discern no significance in United's assertion that it is Commission practice to review each supplemental application to ascertain whether the licensee is operating in the public interest. Assuming that such a review occurred here, it would undoubtedly have been limited to matters concerning the licensee's basic qualifications, and, in any event, would not foreclose our obligation to determine whether United's record entitles it to renewal of license.

prevent the relitigation of any adverse findings from the other proceedings, but that United would be permitted to introduce mitigating evidence. 86 FCC 2d at 459, 49 RR 2d at 603; Order, FCC 81M-2067, released July 7, 1981.

8. A brief summary of the adverse findings in the three previous proceedings is appropriate. In the WOOK(AM) comparative renewal case (55 FCC 2d 416, 34 RR 2d 1465 (1975)), the Commission disqualified United after finding: (a) that various ministers had used WOOK(AM) from 1966 through mid-1969 to broadcast lottery information via scriptural citations that in reality were thinly disguised "numbers game" tips (a form of gambling violative of both 18 U.S.C. 1304 and local law) in return for monetary donations; (b) that WOOK(AM) had continued to violate the Commission's technical rules until the end of 1969, despite a 1966 forfeiture of $7,500 for rule violations and a representation that its future operations would be in compliance with the technical rules—a basis for its previous renewal; and (c) that WOOK(AM) engaged in false and misleading advertising. The Commission concluded with respect to the illegal lottery that United's conduct displayed a callous disregard for its listening audience and that United (and its principal Richard Eaton) were remiss in their supervision of WOOK(AM)'s religious broadcasts (55 FCC 2d at 422, 34 RR 2d at 1473). In the WFAB noncomparative proceeding (55 FCC 2d 832, 35 RR 2d 119 (1975)), the Commission held that the public interest would not be served by renewal of United's license because WFAB'S local management had by its careless and negligent practices directly facilitated a scheme of extensive fraudulent billing, in violation of Section 73.1205 of the Commission's Rules, by a local retail appliance dealer during the period of January 1971 through May 1972. Moreover, although the Commission concluded that the evidence fell short of establishing that any United employee or principal consciously participated in the fraudulent billing scheme, it nevertheless disqualified the licensee for its indifference to Commission policies and extensive record of negligent supervision and control that allowed the scheme to occur. The Commission held that the totality of United's conduct was tantamount to an intentional disregard of the Commission's rules. 55 FCC 2d at 838, 35 RR 2d at 127.

9. The third proceeding involved WOOK(FM) itself and two contests that it aired in 1977–1978. In a Notice of Apparent Liability issued to United on November 30, 1978, the Commission alleged that certain of United's announcements and actions concerning the two contests violated Section 73.1216 of the Rules governing licensee-conducted contests and imposed a $6000 forfeiture against the station, which was uncontested. The violations regarding the "Black Book Contest," broadcast from December 1977 through January 1978, included: (a) failure to fully and accurately disclose all material contest terms, *i. e.*, WOOK(FM) did not disclose the nature and value

of the actual prizes to be awarded; (b) a false and misleading announcement that winners in the "Black Book Contest" became qualified for all station contests conducted in 1978; and (c) failure to conduct the contest substantially as announced. As to the "Thousand Dollar Dial Contest," aired during January and February 1978, a station announcement that listeners in the Washington, D.C. "area" might be called was considered false and misleading since the contestants were chosen at random from District of Columbia and Maryland telephone directories only and listeners from the Virginia suburbs of Washington were precluded from participating in the contest. District Exh. 20.

10. At the instant hearing, United offered evidence in mitigation of all of the above misconduct. This evidence included, *inter alia*, the establishment of a central billing procedure in 1973 whereby bills to advertisers on all United stations would be issued from the central office based on station logs which showed advertisements actually run; the institution of an educational program in the late 1970's to teach employees to recognize the elements of a lottery; and the development and implementation of procedures in 1978 relative to contests. I.D., para. 47. Moreover, in 1978, United's consulting engineers began to make unannounced periodic technical inspections of its various stations. I.D., para. 46.

11. In the I.D., the ALJ took into account United's mitigating evidence, but he gave it reduced weight, pointing out that the mitigating efforts only began when United knew its licenses were in jeopardy. I.D., paras. 105, 114. He also stated that the contest violations at WOOK(FM) detracted from United's improvement efforts and indicated a continuing failure by United to clean up its operations as late as 1977 and early 1978. I.D., para. 106. Nonetheless, noting that Richard Eaton was United's sole stockholder and relying on the "implications" of *Friendly Broadcasting Co.*, 90 FCC 2d 225, 51 RR 2d 1006 (1982) (where, following Eaton's death, the Commission summarily renewed two other United licenses in a noncomparative proceeding without considering the ALJ's findings of disqualifying misconduct), the ALJ concluded that United could not be disqualified in this proceeding for its misconduct at another station. I.D., para. 111. He stated that the effect of Eaton's death on United's comparative qualifications was a different matter, however, and that Eaton's departure from the managerial scene could not be used to upgrade United's comparative case. I.D., paras. 111, 112. Finding that United did not offer evidence that Eaton was solely responsible for the WFAB, WOOK(AM), and WOOK(FM) misconduct (I.D., para. 110), the ALJ assessed a substantial comparative demerit against United for its unwillingness or inability to control Stations WOOK(AM) and WFAB. I.D., para. 114. The WOOK(FM) forfeiture matter did not add to the demerit because the ALJ considered it of minor significance. *Id.*

12. In its exceptions, District contends at the outset that *Friendly Broadcasting Co., supra,* does not stand for the proposition that Eaton's death exonerates United from misconduct at WOOK(AM) and WFAB, and it argues that it was error for the ALJ to rely on that case as support for not disqualifying United. District further contends that United should have been disqualified, based on its prior misconduct at WOOK(AM) and WFAB, because individuals previously holding responsible positions in United at the time of the misconduct continue to be involved in WOOK(FM). Finally, it asserts that insufficient weight was given to the WOOK(FM) contest violations and argues that these violations should be additional grounds for disqualification. United, on the other hand, concurs with the ALJ's holding that it is basically qualified but contends that the ALJ erred in assessing a comparative demerit against it. It argues that its misconduct at WFAB and WOOK(AM) is remote in time and thus lacks probative value; that such misconduct has never occurred at WOOK(FM); that it has instituted successful remedial measures that must be given full credit; that the contest violations at WOOK(FM) are decisionally insignificant since they were minor, inadvertent, and of a technical nature; and that the effect of Eaton's death must be considered since he ran what amounted to a one-man operation.

13. We affirm the ALJ's ultimate conclusion that United should not be disqualified here and reject District's exceptions to the contrary. We agree with District, however, that the ALJ's reliance on *Friendly Broadcasting Co., supra,* as a basis for not disqualifying United is misplaced. In note 16 of *Friendly* (90 FCC 2d at 228, 51 RR 2d at 1009), the Commission unequivocally stated that its finding of nondisqualification was confined strictly to that proceeding, and made its renewal grants subject to such action as it might deem appropriate in light of the ultimate findings in the WOOK(FM) proceeding. Moreover, the very Commission order that specified the WOOK(AM) and WFAB misconduct issue here expressly contemplated the possibility of Eaton's future absence (albeit via an application for involuntary transfer of control due to illness), and emphasized that "a serious question would still remain about the soundness and reliability of the licensee's operations and, thus, about United's basic qualifications." 86 FCC 2d at 458 n. 24, 49 RR 2d at 603 n. 24. Accordingly, our conclusion that United is basically qualified does not rest on *Friendly* or on Eaton's death.

14. It is well established that disqualification of a licensee for misconduct at one station does not necessarily mean that the licensee is totally unfit to retain any existing license. That depends on the nature of the particular misconduct. *See Faulkner Radio, Inc.,* 88 FCC 2d 612, 50 RR 2d 814 (1981); *RKO General, Inc.* v. *FCC,* 670 F.2d 215, 237 (D.C. Cir. 1981) ("individual stations have different broadcast histories and policies"). The pertinent question here is

whether United's record predicts that it is able, and can be relied upon fully, to perform the obligations of a Commission licensee in the operation of WOOK(FM). *See* 86 FCC 2d at 458, 49 RR 2d at 603; *Faulkner, supra.* Thus, we find it significant (as we explain *infra*) that the misconduct at WOOK(AM) and WFAB was the result of a serious lack of supervision over operations by United's local management, rather than the personal participation by Richard Eaton in deliberate wrongdoing. Further, although serious misconduct of the magnitude found at WOOK(AM) and WFAB does not appear to have occurred at WOOK(FM), the FM station's operating record is marred somewhat by the 1977–78 contest violations which, although requiring some sanction, again reflect mostly inattentiveness. However, the ALJ held that these matters were not the result of deliberate misconduct at WOOK(FM) or sufficiently extensive to be disqualifying, and we agree.

15. On the other hand, we also conclude (as did the ALJ) that the impact of United's misconduct at WOOK(AM) and WFAB on its *comparative* qualifications is a different matter and that United deserves a substantial comparative demerit for its record of management misconduct. United's contention that no demerit is warranted because the misconduct is now remote in time is without merit. Although United is correct that the recency of misconduct is frequently a relevant factor in evaluating the impact of that misconduct on an applicant's qualifications, *RKO General, Inc.*, 78 FCC 2d 1, 27, 47 RR 2d 921, 942 (1980), that general principle is not controlling here because the misconduct at both stations was the specific reason that WOOK(FM)'s renewal application, filed in 1969, was deferred by the Commission. Under these circumstances, we are obliged to consider United's record of performance over the entire period from 1966 through 1978, even though part of that period is now "remote" in time. See paragraph 6, *supra.* Similarly, while United's post-misconduct remedial efforts may militate, in part, against disqualification of the licensee (see paragraph 14, *supra*), those belated efforts cannot, for comparative purposes, obliterate the demerit otherwise warranted for the serious misconduct that took place prior to and during the pendency of its renewal application before the Commission. A contrary policy would permit licensees to operate in a deficient manner, secure in the knowledge that subsequent remedial efforts would guarantee renewal if a challenge to their licenses should ever be mounted. This is not permitted. *See Trustees of the University of Pennsylvania*, 69 FCC 2d 1394, 1422, 44 RR 2d 747, 781 (1978).

16. Finally, United's contention that no demerit is justified in light of Richard Eaton's death is rejected. Although United offered evidence to show that Mr. Eaton exercised a substantial degree of sway over all of United's stations, it did not on the record here establish that its current principals and managers had no responsi-

bility for its previous misconduct; it merely asserts in its brief (at 52) that these individuals were not "tied in any way" with the misconduct.[5] However, the findings of fact in the WOOK(AM) and WFAB proceedings appear on their face to counter United's latest assertion. A few examples will suffice. First, in the WOOK(AM) case, the Commission did not find that Richard Eaton was personally implicated in the fraudulent schemes or that he intentionally violated rules; rather, the cause was laid primarily to unsupervised local management. *See* 55 FCC 2d at 419–25. Second, United's E. Carlton Myers and Clifton Holland were the highest management officials when the 1969 violations at WOOK(AM) occurred. 55 FCC 2d at 435, 460 (Initial Decision). Indeed, Myers, the former general manager of WOOK(AM) and current general manager of WOOK(FM), was found to have had substantial responsibility over the religious broadcasts on WOOK(AM) that contained the illegal numbers tips. *Id.* at 449. Similarly, Holland, previously WOOK(AM)'s operations manager (*id.* at 460) and now WOOK(FM)'s public affairs director, had primary responsibility for reviewing advertising to ensure that it was not misleading (*id.* at 457), conduct, in part, for which WOOK(AM) was denied license renewal. Finally, Myers and Holland were in charge of ensuring that WOOK(AM)'s power changed on time at sunrise and sunset (*id.* at 478), and the 1969 technical violations at WOOK(AM) included several instances of failure to change power in a timely manner. *Id.* at 429, exception No. 26. Notwithstanding, United proffered no evidence here concerning these individuals that would exonerate them of responsibility for the serious misconduct that occurred at WOOK(AM) while they held the highest managerial roles.[6]

17. In other words, while United now argues that Richard Eaton was *solely and personally* responsible for all of United's previous misconduct, and that WOOK(FM)'s current management (in its previous incarnations) was blameless, the record and prior Commission findings indicate otherwise. In fact, in the WOOK(AM) and WFAB cases, United argued—with some apparent success—that United's misdeeds occurred without the knowledge or intent of

---

[5] By Memorandum Opinion and Order, FCC 81M-3103, released September 30, 1981, the ALJ permitted United to adduce evidence concerning the death of Richard Eaton, the persons to whom his United stock would be transferred, and the pertinent background of each such transferee. While evidence on "new staffing, future operational plans, and similar matters" was ruled out because of concern about voluntary upgrading of United's management proposal, *id.* at para. 12, United was not prevented from explicating the current management's previous roles, if any, at United and at WOOK(AM) and WFAB. And it was permitted to offer evidence in mitigation. See paragraph 7, *supra.*

[6] Other current United principals were also involved in the United organization, but not at WOOK(AM) or WFAB, at the time of the disqualifying misconduct at those stations. *See* 55 FCC 2d at 434; United Exh. 7.

Richard Eaton, and that the responsibility, if any, lay with ineffective or careless local managers. *See, e.g.*, 55 FCC 2d at 419–25, 55 FCC 2d at 836–41. In view thereof, a substantial comparative demerit must be assessed here in evaluating United's renewal qualifications for WOOK(FM). While we are satisfied that the mitigating factors discussed in paragraph 14, *supra*, are adequate to forefend absolute disqualification, the past deficiencies of key officials in WOOK(FM)'s present management do diminish its future reliability. Where, as here, the Commission has characterized United's previous misconduct as "serious, repetitive, far-flung, and exclusively within its broadcast operations," 86 FCC 2d at 458, 49 RR 2d at 602, and has questioned whether United was "either deliberately flouting FCC rules or is irremediably incompetent," *id.*, it was incumbent upon United to dispel the Commission's stated doubts concerning WOOK(FM)'s potential reliability as a licensee. *Id.* It has not. This case is thus clearly distinguishable from *Faulkner Radio, Inc., supra*, in which the licensee successfully demonstrated that "all misconduct resulted directly from the actions of *one individual* . . . who is no longer associated with [it]." 88 FCC 2d at 617, 50 RR 2d at 818 (emphasis added). Even there the Commission conditioned renewal of Faulkner's licenses (in a noncomparative proceeding) on the total exclusion of the previous malfeasor from *any* role in *any* of its stations. In the instant case, conversely, a substantial comparative demerit is the warranted effect of United's previous misconduct, particularly when that misconduct took place under the managerial aegis of several of the selfsame officials who now hold positions of high supervisory responsibility at WOOK(FM).[7] *See generally Peoples Broadcasting Corp.*, 92 FCC 2d 1303, 52 RR 2d 1617 (Rev. Bd. 1983) (substantial comparative demerit in FM proceeding where applicant official partially responsible for misconduct at "sister" AM station). United's "total indifference" (55 FCC 2d at 838) to billing irregularities at WFAB and its "gross disregard of Commission policy" (*id.*) are likewise an inextricable part of United's stewardship, and must be considered negative predictors on the scale of comparative fitness.

18. *Past Performance.* At hearing, United offered no direct case concerning its pre-1975 broadcast record—which consisted of Spanish-language programming—arguing that the only relevant license period was 1975–1978 and that evidence relating to earlier programming was difficult to locate. I.D., para. 97. The record evidence for the pre-1975 period is therefore scant, consisting essentially of

[7] While *Gross Telecasting, Inc.*, 92 FCC 2d 204, 52 RR 2d 851 (Rev. Bd. 1982), is cited to us as requiring license renewal even where all principals involved in previous misconduct have not severed their connections with the licensee, that case was a noncomparative proceeding and, as here, the licensee was not disqualified because of the previous misconduct. There, as here, the departure of a key management figure was considered as a mitigating factor, but the Commission had no occasion to consider whether a comparative demerit was warranted because of the past misconduct and a lack of complete change in top management.

WOOK(FM)'s composite week percentages of news, public affairs, and all other non-entertainment programming excerpted from its renewal and supplemental renewal applications, and statements by Hispanic's witnesses that the abandonment of Spanish-language programming on WOOK(FM) after 1976 was a "tragic blow" to the Washington Hispanic community. I.D., paras. 16–20, 37. There is no record evidence that would permit a comparison of WOOK(FM)'s programming performance from 1966 to 1975 with that of other stations in the area, except for the limited statistical information concerning the 1978 renewal applications taken from the Arbitron Company's "Metro Survey Area" report. I.D., para. 98.

19. In the I.D., the ALJ rejected United's argument that only the 1975–1978 period was relevant and attempted to evaluate United's broadcast record from 1966 to 1978. He compared the Arbitron 1978 figures for non-entertainment programming against United's 1969, 1972, 1975, and 1978 percentages to determine United's ranking in the market. Based on the relatively low ranking of United's non-entertainment programming other than news and a meagerness of local news coverage during the time WOOK(FM) broadcast Spanish-language programming, the ALJ found that United's pre-1975 broadcast record was minimal. I.D., paras. 98–99, 114. With respect to WOOK(FM)'s post-1975 broadcast performance, the ALJ stated that the station's record was compiled after United lost its licenses for WOOK(AM) and WFAB, see note 1, *supra*, and was therefore entitled to diminished weight on the theory that it showed only the reaction of a station to the prospect of the non-renewal of its license. I.D., paras. 103, 114. He observed, however, that WOOK(FM)'s post-1975 performance would have been considered substantial, because of dramatic improvements in its news programming, if that performance had come before United had fears for its licenses. I.D., paras. 101, 114. Based on United's minimal pre-1975 performance, the diminishment of its post-1975 broadcast record, and the substantial demerit for United's previous misconduct, the ALJ concluded that United's total broadcast performance during 1966–1978 was "no better than minimal." I.D., para. 114.

20. United contends in its exceptions that WOOK(FM)'s overall past performance was substantial and that it was therefore entitled to a renewal expectancy and a substantial comparative preference. Specifically, it argues that the only relevant period to evaluate its programming performance is the 1975–78 period; that its 1975–78 performance should not have been accorded diminished weight; that WOOK(FM)'s 1966–75 programming is not relevant to this proceeding; and that its 1966–75 broadcast record was substantial, in any event. We have already addressed and rejected United's argument on the relevant renewal period for this proceeding in paragraph 6, *supra*. However, we do agree with United that it was improper to accord diminished weight to WOOK(FM)'s 1975–78 performance.

The ALJ chose 1975, the year of the Commission's decisions denying renewal of WOOK(AM) and WFAB, as the cut-off point after which United was not entitled to full weight for its broadcast record—the rationale being that improvements taking place after a licensee is in fear of the nonrenewal of its license are valueless. We conclude that this was error. Arguably, the ALJ could just as easily have chosen any of a number of other dates in this proceeding as the point at which United first had a legitimate and reasonable concern that its license for WOOK(FM) was in jeopardy—for example, 1969, when WOOK(FM)'s application was deferred; 1973, when WFAB's application was designated for hearing and WOOK(AM)'s renewal application was denied in an Initial Decision; 1974, when WFAB's renewal application was denied in an Initial Decision; or 1977, when the WOOK(AM) Decision became final. A better approach, in our view, is to place the cut-off date for program performance evaluation at the traditional processing notice point, viz., when a competing application or petition to deny is filed. *See RKO General, Inc.*, 35 FCC 2d 100, 24 RR 2d 411 (1972). *See also Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 712–713, 51 RR 2d 389, 396 (Rev. Bd. 1982) ("In general, then, and in the future, we believe that programming evidence accruing *after the filing of a competitive application* is *post litem motam* and thus entitled to reduced weight." Emphasis added, footnote omitted). Prior to this date, there are no competitors who may be prejudiced by upgrading, and adhering to a date certain will serve to eliminate in the future the kind of dispute which arose in this case.[8] Thus, since competing applications in this proceeding were not filed until August 31, 1978, full weight should have been given to WOOK(FM)'s 1975–1978 performance.

21. Nevertheless, we are unable to conclude that United's past broadcast performance, considering the entire 1966–1978 period, is sufficient to warrant a renewal expectancy and the comparative preference that accompanies it. In making this judgment and affirming the ALJ's conclusion, we are guided by the standards set out by the Commission in *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 49 RR 2d 1138 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (D.C. Cir. 1982). An incumbent's "legitimate renewal expectancy" attaches only when his past performance has been "meritorious" or "substantial"; "minimal service" is merely adequate—sufficient to permit renewal if there are no competing applications, but not enough to yield a renewal expectancy or a

[8] *Lamar Life Broadcasting Co.*, 24 FCC 2d 618, 19 RR 2d 851 (1970), cited by the Mass Media Bureau in support of the ALJ's ruling, is inapposite. The licensee in that proceeding had been found previously by the United States Court of Appeals for the District of Columbia Circuit to be a licensee in name only and not entitled to the status of a renewal applicant. The Commission therefore ruled in its designation order that the licensee would not be permitted to gain a preference for its past broadcast record since that would not be competition on even terms. No similar restriction was placed on WOOK(FM).

comparative preference in the face of a challenge. *Simon Geller*, 90 FCC 2d 250, 270 and n. 99, 51 RR 2d 1019, 1037 and n. 99 (1982). In the instant case, we note first that there is insufficient record evidence to establish that WOOK(FM)'s overall performance during 1966–1978 was meritorious, because it has only provided meaningful information for the 1975–1978 period. While we tend to agree with United that its most recent license period (prior to the filing of competing applications) is the most probative in terms of predictive value, this limited showing of proficiency cannot carry WOOK(FM)'s burden of showing meritorious service over the entire 12-year period that we deem relevant, even if we were to hold with the ALJ that United's 1975–1978 performance was substantial. *See Intercontinental Radio, Inc., supra.* This point is underscored by the ALJ's conclusion that WOOK(FM)'s 1966–1975 record was only minimal.

22. Second, we agree with the ALJ that the overall performance evaluation that constitutes the renewal expectancy analysis encompasses licensee conduct as well as program performance, for both factors have important predictive value and must be weighed simultaneously. *Cf. Central Florida Enterprises, Inc., supra*; *Simon Geller, supra.* We have already concluded that United's previous misconduct and the continuing relationship of WOOK(FM)'s present management (and its future reliability) warrant a substantial comparative demerit against United. See paragraph 17, *supra.* Even if we were to conclude that the evidentiary record provided a sufficient basis for finding that WOOK(FM)'s overall programming performance during 1966–1978 was substantial, which we do *not*, that conclusion would be offset by United's past conduct, primarily at WOOK(AM). The renewal expectancy is based on a threefold concern that an incumbent's "proven performance" and "acceptable service" should not be supplanted by an inferior one; that licensees should be encouraged to ensure "quality service"; and that routine comparisons of incumbents and challengers (without adequate recognition of past performance excellence) could lead to a "haphazard restructuring of the broadcast industry." *Cowles Broadcasting, Inc., supra*, 86 FCC 2d at 1013, 49 RR 2d at 1156. When these three bases are attenuated in a particular case, the renewal expectancy is commensurately weakened. *See Central Florida, supra*, at 510 n. 40. This is such a case. United's past performance has not been adequately proven, and what has been proven is significantly marred by serious past misconduct and concerns about future reliability. Thus, we decline to award a renewal expectancy to WOOK(FM) and now proceed to examine the remaining issues in this case "just like an ordinary comparative proceeding where all applicants are competing for a new station." *Simon Geller, supra*, 90 FCC 2d at 270, 51 RR 2d at 1037.

23. *Specialized Programming.* All three applicants propose a specialized program format: Hispanic proposes a Spanish-language

format while United and District propose Black-oriented formats. However, Hispanic is the only applicant that sought a comparative advantage arising out of its proposed format. By Order, 49 RR 2d 248 (1981), the ALJ found that Hispanic had made the requisite threshold showing that its proposed format was specialized and unique and permitted it to adduce evidence respecting a need for the format. That evidence is summarized in paragraphs 75–96 of the I.D.

24. Hispanic's proposed service area includes more than 93,000 persons of Hispanic origin, which is approximately 3% of the population. I.D., paras. 75–76. Hispanic proposes to operate from 5:00 A.M. to 2:30 A.M. Monday through Saturday and from 6:00 A.M. to 1:00 P.M. on Sundays. I.D., para. 90. Over 60% of Hispanics in the Maryland suburbs of Washington use no English at home although all Hispanics surveyed spoke some English. I.D., para. 79. Moreover, approximately 25% of Hispanics in Washington are said to have no knowledge of spoken or written English. I.D., para. 80. There are six area radio stations that provide Spanish-language programming to some degree. I.D., paras. 86, 88. One of them, WMDO, a daytime-only AM station licensed to Wheaton, Maryland, broadcasts solely in Spanish. I.D., para. 88. It provides a primary signal over 96.4% of Washington and substantial portions of some of the principal Maryland and Virginia suburbs during much of the day. I.D., para. 89. During the two hours after sunrise and two hours before sunset, the station's coverage is reduced to 61% of Washington, a smaller area of the Maryland counties, and no coverage of Virginia. *Id.* The ALJ concluded that there was "meaningful" Spanish-language broadcasting in the area, based primarly on the broadcasts of WMDO, and ruled that Hispanic was not entitled to a programming preference. I.D., para. 119.

25. Hispanic argues that the ALJ erred in finding that it was not entitled to a substantial preference for its proposed format, citing *American International Development, Inc.*, 86 FCC 2d 808, 49 RR 2d 1029 (1981), where a significant preference was awarded to an applicant that proposed a first nighttime Spanish-language radio service. Hispanic urges that there is a need for both daytime and nighttime Spanish-language programming to serve the entire Washington area and that it proposes to meet that need. Additionally, Hispanic contends that the ALJ erred in not awarding it a decisionally dispositive preference for the overall quality of its programming.

26. We conclude that Hispanic is entitled to a slight preference for its specialized format. The Commission's most recent guidelines in this area are set forth in *George E. Cameron, Jr. Communications*, 71 FCC 2d 460, 465, 45 RR 2d 689, 694 (1979), where the Commission held that preferences for specialized formats would not be awarded if the proposed programming was present in the community in a substantial amount. *See also Flint Family Radio*, 69 FCC 2d 38, 41

RR 2d 1155 (Rev. Bd. 1977). Applying that standard here, we disagree with Hispanic that daytime Spanish-language programming is not available in a substantial amount in the Washington, D.C. area. *Cf. Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 50 RR 2d 1251 (Rev. Bd. 1982). In addition to WMDO (which provides daylong Spanish-language entertainment, local, regional, and national news, and public affairs programming), WPFW-FM, WFAX, WJMD, and WHUR broadcast various amounts of Spanish-language programming throughout the week. I.D., para. 86.[9] Thus, it is apparent that Hispanic's claim to a preference based on the daytime portion of its proposal is without merit. On the other hand, Hispanic is certainly entitled to some preference for its proposal to provide a Spanish-language nighttime service that is currently lacking. That preference is diminished, however, because the programming issue is cast in comparative terms and involves the relative need for a Spanish-language format versus the proposed Black-oriented formats, rather than general market formats. See FCC 81M-776, *supra*. United currently provides a Black-oriented format on the FM frequency being sought, and the percentage of Black population in the service area far exceeds the percentage of Hispanic population (3.0%). Moreover, the number of Black-oriented stations in the Washington area can hardly be considered abundant in relation to the large Black population in the District of Columbia.[10] Nonetheless, some credit is warranted to Hispanic, since there is no aural Spanish-language programming at night. Neither *American International Development, Inc.*, *supra*, nor *Broadcast Communications, Inc.*, 93 FCC 2d 1162, 53 RR 2d 805 (Rev. Bd. 1983), provides support, however, for the substantial programming preference that Hispanic seeks. Both cases involve the relative need for Spanish-language formats versus general market formats, and, unlike the Black-oriented formats here, the latter were abundant in both proceedings. Hispanic will be given a slight preference for its specialized format.[11]

---

[9] The ALJ's findings as to the amount of Spanish-language programming available also included TV stations. Such findings have not been considered here since the proposed facility is an FM broadcast station. In *Cameron*, and *American*, *supra*, the Commission did not appear to weight the presence of television stations in the area and we therefore do not propose to go beyond the Commission's analysis in this case. On the other hand, AM and FM facilities have long been treated as one aural service and are both included here. *See Broadcast Station Assignment Standards*, 39 FCC 2d 645, 26 RR 2d 1189 (1973).

[10] There are three commercial radio stations and one noncommercial FM station with Black formats. Hispanic Exh. 30. The record is not clear, however, as to the number of stations carrying some Black programming.

[11] District's contention that this matter should not have been explored is rejected. Implicit in our award of a slight preference to Hispanic is the recognition that the ALJ correctly permitted the inquiry based on Hispanic's threshold showing. District would also diminish the weight of the testimony of Hispanic's witnesses regarding the number of Hispanics who cannot speak English. We disagree. Although such information inherently involves a great deal of subjectivity,

Hispanic's additional request for a decisionally dispositive preference for the overall quality of its programming is denied as being beyond the scope of the inquiry contemplated by the Commission and authorized by the ALJ, which pertains to the need for a particular format, rather than the quality of individual programs. See 49 RR 2d 248.

27. *Reporting Issue.* By Memorandum Opinion and Order, FCC 81M-476, *supra*, the ALJ specified a Section 73.3514 issue against Hispanic based on its failure to report in its application that one of its principals had been convicted of a crime. Section 73.3514 of the Rules requires that an application shall include all information called for, and paragraph 8(d), Section II, of the application form (FCC Form 301) asks whether ". . . any party to the application has been found guilty of . . . any felony or any other crime . . ." Hispanic responded to paragraph 8(d) in the negative, notwithstanding that Fernando Casillas, a Hispanic principal when the application was filed, had formerly pled guilty to violating 18 U.S.C. §209, a misdeanor, by giving money to a government employee in return for a larger share of government business. United Exh. 80.

28. Upon receipt of an obsolete questionnaire from Hispanic's communications counsel in 1978, asking whether Casillas had been convicted of a felony or lesser crime involving moral turpitude, [12] Casillas contacted his personal attorney for advice whether his prior conviction required an affirmative answer to the question. I.D., para. 71. Casillas was informed that he could answer "no" to the questionnaire since the violation was not a felony nor, in counsel's view, did it involve moral turpitude. *Id.*[13] Accordingly he completed the questionnaire with a "no" response. None of the other principals was aware of the guilty plea, and paragraph 8(d) of the application was filed with a negative answer. Subsequently, Casillas voluntarily resigned from Hispanic. Hispanic Exh. 7. The ALJ found that the conviction should have been reported by the applicant, rejected arguments by United and District that Hispanic's principals were derelict, except in a minor way, in their duty to supervise the preparation of the application, and concluded that the matter was

---

Hispanic has demonstrated that a sizable percentage of Hispanics in the Washington area have difficulty with the English language. See, *e.g.*, Hispanic Exh. 19.

[12] The questionnaire was obsolete because paragraph 8(d) of the application form had previously been broadened to inquire into "any" crime other than a felony, without regard to whether such a crime involved moral turpitude. See paragraph 27, *supra*

[13] In contending that the violation did not involve moral turpitude, Casillas' attorney rationalized that 18 U.S.C. §209 merely prohibits the payment of gratuities to government employees and that acceptance of Casillas' guilty plea did not involve a finding that Casillas had participated in any fraudulent activity or that he made any payments to a government official with the intent to defraud the government or obtain preferential treatment. Hispanic Exh. 12.

decisionally insignificant. I.D., para. 116. Both United and District except to the ALJ's conclusion and urge the Board to impose a substantial demerit against Hispanic. District also repeats its previous contention that Hispanic was grossly indifferent to the accuracy of its application, having relied solely on counsel to prepare it.

29. It is clear from the ALJ's conclusions and from the exceptions that Hispanic's failure to report Casillas' conviction was tried essentially as an ineptness issue, without emphasizing the traditional "accuracy" issue concerns of full disclosure, materiality, and intent to deceive. *Cf. Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 50 RR 2d 1321 (Rev. Bd. 1981), *modified*, 53 RR 2d 44 (1983). Thus, the ALJ found a very minor dereliction of duty to *supervise*, I.D., para. 116, but made no findings or conclusions concerning the candor/misrepresentation aspects of the issue.[14] In remedying this omission, we conclude that Hispanic must be assessed a slight comparative demerit for its reporting failure.

30. Although we agree with the ALJ that Hispanic should not be faulted for relying on counsel to help prepare its application, the applicant is ultimately responsible for the factual and biographical matter contained therein. *Lorain Community Broadcasting Co.*, 18 FCC 2d 686, 16 RR 2d 946 (1969). Thus, while Hispanic's counsel clearly erred in mailing Casillas an obsolete questionnaire, we do not believe that Casillas displayed the appropriate forthrightness in answering the (wrong) question placed before him with the single word "no". The underlying purpose of the query relating to past criminal conduct was obvious and the response, even if "technically correct" in the misjudgment of counsel, was materially deficient in the degree of forthcomingness expected of an applicant. Having pled guilty to a serious crime, Casillas' unqualified response in the negative was clearly misleading. As the court noted:

> The Commission must rely heavily on the *completeness* and accuracy of the submissions made to it, and its applicants in turn have an *affirmative duty* to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic, and well known.

*RKO General, Inc., supra*, 670 F.2d at 232 (emphasis added). Moreover, "advice of counsel cannot excuse a clear breach of duty [to fully inform Commission of adverse facts]" (*id.* at 231), and the "legal argument" of counsel "cannot excuse the calculated omission" (*id.*) of a candid recitation of Casillas' criminal history. Hence, while Casillas' reliance on counsel in this matter may be mitigating, it cannot be wholly exculpating, lest we encourage applicants to furnish deceptively incomplete information and to fall back blame-

[14] However, in designating the issue, the ALJ observed: "It is difficult to credit anyone believing, or advising, that the bribery of a public officer does not involve moral turpitude." FCC 81M-746, *supra*, at para. 8.

lessly on counsel in any ensuing crunch. *See generally George E. Cameron, Jr. Communications*, 53 RR 2d 917, 926 (Rev. Bd. 1983). Casillas and his counsel were obviously aware of the significance of an applicant's criminal history, and the artless evasion evident here is culpable. *Cf. Coastal Bend Family Television, Inc.*, __ FCC 2d __ , 54 RR 2d 367, 374 (Rev. Bd. 1983), Paradoxically, had Casillas candidly answered the "wrong" paragraph 8(d) question, a complete and accurate response to revised paragraph 8(d) would have appeared on Hispanic's application.

31. In faulting Casillas' understatement, however, in addition to noting the slight mitigating role of advice of counsel, we also note that Hispanic's other principals were apparently unaware of Casillas' conviction and his lack of candor (I.D., para. 73); Casillas was only a 5% stockholder and was not proposed to be integrated into the station's operation (I.D., paras. 61–62 and note 15); and Casillas resigned from Hispanic shortly after these matters came to light (Hispanic Exh. 9; FCC 81M-746, *supra*). These factors further mitigate the potential decisional significance of Casillas' misconduct and result in the assessment of only a slight demerit. *See Nuance Corp.*, 85 FCC 2d 412, 49 RR 2d 147 (Rev.Bd. 1981). Although the court has held that the Commission must examine the effect of "character" questions relating even to a minor stockholder, *see TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973) (cases remanded, *inter alia*, to assess impact on applicant of activities of 1.54% principal who was no longer actively involved), we have recently indicated our view that the isolated lack of candor of an individual principal should be regarded generally in some reasonable proportion to that principal's ownership share. *Horne Industries, Inc.*, __ FCC 2d __ , 54 RR 2d 249, 259 n.45 (Rev. Bd. 1983). Hispanic's slight comparative demerit here would seem to be an appropriate penalty for Casillas' lack of candor (as well as any residual taint associated with his personal criminal history).

32. *Integration of Ownership and Management.* District is comprised of four 25% stockholders, one of whom, Dr. Herman F. Stamp, proposes to work full time as the station's managing director. He currently is self-employed as a practicing dentist in the District of Columbia and holds various positions at Howard University. If District is successful in obtaining a grant of its application, Dr. Stamp avers that he will devote no more than six hours per week to dental consultant services and will give up his other vocational activities. I.D., paras. 50, 52. Dr. Stamp, who is Black, is a life-long resident of the District and active in civic affairs. I.D., paras. 50, 51. He has no broadcast experience. The other three District stockholders, who are also Black and residents of Washington, D.C., each propose to devote four hours per week to participating at board meetings. I.D., paras. 57–60. Hispanic is composed of seven stockholders, all of whom are Hispanic. The applicant will hire a general

manager and professional staff to operate the station on a daily basis, but six of its seven stockholders intend to devote a few hours per month to the station in a supervisory role, working on the management and financial committees. I.D., para. 62. They all live in the Washington area. United claims no integration credit.

33. The ALJ concluded that District was entitled to 25% full-time quantitative integration credit for Dr. Stamp, compared to none for Hispanic or United. He gave District minor residual enhancement credit for the minimal participation of its other principals but ruled that their proposals, as well as the minimal participation of the Hispanic principals, were not entitled to any quantitative integration credit because they were far less than 20 hours per week, citing *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 45 RR 2d 1 (Rev. Bd. 1979). United excepts to the ALJ's award of any significant integration credit to District, claiming that substantial questions exist as to Dr. Stamp's commitment to devote 40 hours per week to the station. Specifically, United argues that Dr. Stamp is 60 years old, has been a dentist for 35 years, teaches dentistry, has no broadcast experience, has vaguely defined duties, was not proposed to be integrated in District's original application, and was not involved in preparing the application. Hispanic faults the ALJ for not specially crediting its 100% minority ownership.

34. We conclude that the ALJ correctly found that District was entitled to 25% full-time integration credit. United's exception that Dr. Stamp will not effectuate his commitment consists wholly of surmise and speculation and therefore does not provide adequate reason to upset the ALJ's conclusion. Dr. Stamp's age is irrelevant, absent a showing that his health will not allow him to meet his commitment, as are his present vocational activities which he proposes to curtail to ensure that he can devote 40 hours per week to the station. Moreover, broadcast experience is solely an enhancing element, and its absence does not detract from District's integration proposal. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 848; 50 RR 2d 1117, 1131 (Rev. Bd. 1981); *Webster-Baker Broadcasting Corp.*, 88 FCC 2d 944, 951–2, 50 RR 2d 1143–48 (Rev. Bd. 1982). Nor do we discern how Dr. Stamp's noninvolvement in preparing the application detracts from his commitment to work 40 hours per week at the station in the future. In addition, contrary to United's argument, Dr. Stamp's proposed functions were specifically described in considerable detail at the hearing. *See I.D.*, paras. 54–55. Finally, as noted by the ALJ (para. 125), District proposed Dr. Stamp as managing director before the comparative cut-off date, and the fact that his name was absent from the application, as originally filed, is of no legal moment. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 817, 51 RR 2d 409, 421 (Rev. Bd. 1982).[15]

[15] Although not formally excepting to the integration credit for Dr. Stamp, Hispanic

35. Hispanic's exception that the ALJ erred in not considering its minority ownership is also without merit. The ALJ properly concluded that those principals of Hispanic and District who plan to devote only minimal managerial attention to the station are not entitled to quantitative integration credit. *See Midwest Broadcasting Co., supra*, 70 FCC 2d at 1495, 45 RR 2d at 7 (20 hours per week held as cut-off point below which no credit will be given for part-time integration proposals). Both applicants, however, do receive some slight residual credit for their minimal participation. *Id.* at 1496 n. 14, 45 RR 2d at 9 n. 14; *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396, 5 RR 2d 1901, 1911 (1965); *Webster-Baker, supra*, 88 FCC 2d at 953, 50 RR 2d at 1149. In any event, the slight residual credits to which both District and Hispanic are entitled fully offset one another, since both applicants are 100% minority owned. *See New Continental Broadcasting Co., supra*, 88 FCC 2d at 846, 50 RR 2d at 1130 (Board will not be lured down path of pitting minority against minority). With respect to Hispanic's argument that its minority ownership should be weighed as a separate comparative criterion, we note that the Commission has expressly ruled otherwise. *WPIX, Inc.*, 68 FCC 2d 381, 411–12, 43 RR 2d 278, 316 (1978). *See also Las Misiones De Bejar Television Co.*, 93 FCC 2d 191, 53 RR 2d 119, (Rev. Bd. 1983) *New Continental Broadcasting Co.*, 89 FCC 2d 631, 636, 51 RR 2d 266, 270 (Rev. Bd. 1982). We conclude that District is entitled to a moderate comparative preference under the integration criterion. *See Nuance Corp., supra.*

36. *Diversification of Control of the Media of Mass Communications.* The ALJ ranked United last under this criterion, noting that the applicant must be given a demerit for its interests in other broadcast stations, particularly in nearby Rockville and Baltimore, Maryland. I.D., para. 115. Hispanic and District were ranked equal since neither they nor their principals have any ownership interest in any medium of mass communications. I.D., para. 130. Hispanic, however, contends at length that it is entitled to a substantial preference over District under the diversification criterion. It argues that while there is no evidence that District's application will add a diverse and antagonistic source of information to those already available in Washington, grant of Hispanic's application will significantly diversify existing media ownership by bringing the first Hispanic-controlled, Spanish-language broadcast station to the area.

---

nonetheless appears to fault the ruling on the ground that Dr. Stamp's duties at the station were not determined until after the time for comparative upgrading had elapsed. Hispanic Br. at 37. We find no error in the ALJ's ruling. As indicated above, the applicant proposed Dr. Stamp's integration in a timely fashion. The subsequent formalization of the duties of his position does not detract from his quantitative integration credit since those duties are not at variance with his proposed role. *See WHW Enterprises, Inc., supra.*

We disagree. This theory concerning the meaning of diversity has been previously rejected by the Board in *Commercial Radio Institute, Inc.*, 78 FCC 2d 1016, 47 RR 2d 1307 (Rev. Bd. 1980). There we noted that the essence of the Commission's policy on diversification of control of the mass media is that diversity of programming can best be achieved by promoting *structural* diversity of ownership and control of broadcast facilities. 78 FCC 2d at 1022, 47 RR 2d at 1312. *See also TV 9, Inc.* v. *FCC, supra* (active minority involvement creates presumption that diversity of viewpoints will be enhanced). This structural approach permits the Commission to promote program diversity without entering the quagmire of evaluating the qualitative content of potential programs.[16] Thus, since neither District nor Hispanic has any attributable ownership of other media, we will apply traditional concepts and affirm the ALJ's conclusion that neither applicant is entitled to a preference over the other. Both, however, are entitled to a preference over United, which has not excepted to this conclusion.

37. *Auxiliary Power.* District proposes to install an auxiliary power source to assure continued operation of the station in the event of a power outage. Neither of the other two applicants proposes this. District is therefore entitled to a very slight preference for proposing to use auxiliary power. *See Addendum to Policy Statement on Comparative Broadcast Hearings*, 2 FCC 2d 667, 6 RR 2d 861 (1966).

38. *Petitions to Enlarge Issues.* District excepts to the ALJ's failure to add two issues it requested on November 15, 1980, and July 10, 1981, respectively: an employment practices issue against United, and an ineptness issue against Hispanic. District's exceptions are without merit. We have reviewed the ALJ's decisions denying the requested issues (FCC 81M-1614, *supra*, and FCC 81M-3104, released September 30, 1981) and conclude that they adequately and persuasively set forth sufficient reasons why the requested issues were denied. The exceptions before us raise no new matters of substance which the ALJ did not consider or additional allegations which would warrant a different result. Moreover, even if a substantial question had been raised, remand would serve no useful purpose since District has prevailed in any event.

39. *Miscellaneous Matters.* One further matter requires comment. On April 25, 1983, United filed a motion to reopen the record and to enlarge issues seeking Section 1.65 and violation of labor law issues against Hispanic. The Mass Media Bureau, on the merits, supports addition of both issues, but contends that United's motion

[16] *Simon Geller, supra*, 90 FCC 2d at 272, 52 RR 2d at 1038–39, cited by Hispanic is inapposite. There the licensee provided virtually no informational programming and thus was found not to qualify as a "diverse and antagonistic source" of information in the community. Here, there is no contention that District will not provide any informational programming.

should be denied as being of no decisional significance unless the Board determines that Hispanic is the preferred applicant. We concur with the Bureau that remand of this proceeding is unnecessary in light of our conclusion that District is the preferred applicant. See paragraph 40, *infra*. Without reaching the merits of United's argument, its motion will be dismissed as moot.

40. *Final Comparative Evaluation.* All exceptions having decisional significance have been considered by the Board. We have awarded District a moderate integration preference and a very slight auxiliary power preference. Hispanic receives a slight preference for its specialized program format and a slight demerit for its reporting violation. Both District and Hispanic receive a diversification preference over United. United is entitled to no preferences and no renewal expectancy because it failed to prove that its past broadcast record during the renewal period under examination was meritorious. See paragraphs 21–22, *supra*. When the preferences awarded to District and Hispanic are weighed, the comparative balance tips dispositively in District's favor. District enjoys integration and auxiliary power preferences over Hispanic and integration, auxiliary power, and diversification preferences over United. Hispanic's slight preference for specialized programming does not match in magnitude or importance District's moderate integration preference, *see Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 53 RR 2d 953, 963 (Rev. Bd. 1983), and Hispanic's position is further weakened by its reporting demerit. United, with no preferences whatever and a substantial comparative demerit (see paragraph 17, *supra*), is a distant third. We thus affirm the ALJ's determination that a grant of District's application will best serve the public interest, convenience and necessity.

41. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by United Broadcasting Company, Inc. on January 28 and March 1, 1983, ARE GRANTED, and the amendments ARE ACCEPTED;

42. IT IS FURTHER ORDERED, That the motions for leave to file addendum to brief filed by Hispanic Broadcasting Corporation on March 7 and 31, 1983, ARE GRANTED, and the addenda ARE ACCEPTED; and that the motion to reopen the record and to enlarge issues filed by United Broadcasting Company on April 25, 1983 IS DISMISSED as moot;

43. IT IS FURTHER ORDERED, That the application of District Broadcasting Company (File No. BPH-780831AY) for a construction permit to establish a new FM broadcast station at Washington, D.C., IS GRANTED, and the applications of United Broadcasting Company, Inc. (File No. BRH-589) and Hispanic Broadcasting Corporation (File No. BPH-780901AB) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

FCC 82D–73

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| UNITED BROADCASTING COMPANY, INC.<br>Washington, D.C. | BC Docket No. 80–479<br>File No. BRH-589 |
| For Renewal of License of<br>Station WOOK(FM), Washington, D.C. | |
| DISTRICT BROADCASTING COMPANY<br>Washington, D.C. | BC Docket No. 80–480<br>File No. BPH-780831AY |
| HISPANIC BROADCASTING CORPORATION<br>Washington, D.C. | BC Docket No. 80–481<br>File No. BPH-780901AB |
| For Construction Permits | |

*Appearances*

*Thomas Schattenfield* and *Harry Cole* on behalf of United Broadcasting Company, Inc.; *Lewis I. Cohen* and *Roy W. Boyce* on behalf of District Broadcasting Company; *Lawrence J. Bernard, Jr.* and *Chester F. Naumowicz* on behalf of Hispanic Broadcasting Corporation; and *Daniel Sarno* and *Charles Dziedzic* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE FREDERIC J. COUFAL

(Issued November 1, 1982; Released November 9, 1982)

*Preliminary Statement*

1. This proceeding involves the application of United Broadcasting Company, Inc. (United) for renewal of its license for station WOOK(FM), Washington, D.C.[1] and the applications of District Broadcasting Company (District) and Hispanic Broadcasting Corporation (Hispanic) for construction permits for a new FM station in Washington, D.C., filed August 31, 1978 and September 1, 1978,

[1] The Commission has not acted on an United application for renewal of its license for this station since the application filed in 1966. United has filed an application every three years beginning in 1969 and ending with 1978.

respectively. All applicants propose the use of the same frequency so the applications are mutually exclusive.

2. On September 30, 1980 the Commission released *Memorandum Opinion and Order* (FCC 80–529, 81 FCC 2d 227) designating the three applications for hearing on the following issues:

(a) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(b) To determine, in light of the evidence adduced pursuant to the above issue, which of the applications should be granted.

3. On April 30, 1981 the Commission released *Memorandum Opinion and Order* (FCC 81–208) adding the following issue:

To determine whether, in light of the Commission's findings and conclusions in *United Broadcasting of Florida, Inc.*, 55 FCC 2d 832 (1975), *recon. denied*, 60 FCC 2d 816 (1976) and *United Television Co.*, 55 FCC 2d 416 (1975), *recon. denied*, 59 FCC 2d 663 (1975), *aff'd sub nom. United Broadcasting Co.* v. *FCC*, 565 F.2d 699 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978), United Broadcasting Company has the basic and/or comparative qualifications to be the licensee of Station WOOK(FM).

The burden of proceeding with the introduction of evidence and the burden of proof with respect to this issue were placed upon United.

4. The following issue was added in *Memorandum Opinion and Order* (FCC 81M-746) released March 13, 1981:

To determine whether Hispanic Broadcasting Corporation failed to report in its application any conviction of Fernando Casillas of a crime, and if so, the effect of such failure on Hispanic's comparative qualifications to be a Commission licensee.

5. In *Order* (FCC 81M-776) released March 17, 1981, it was directed that Hispanic "may adduce, under the general comparative issue, evidence respecting a need for its proposed format."[2]

6. *Memorandum Opinion and Order* (FCC 81M-1614) released May 26, 1981 added the following issue:

To determine with respect to United Broadcasting Company, Inc. the effect of the misconduct found in the Commission's Notice of Apparent Liability of November 30, 1978, FCC 78–838, on United Broadcasting Company, Inc.'s absolute and/or comparative qualifications to be a Commission licensee.

7. *Memorandum Opinion and Order* (FCC 81M-3103) released September 30, 1981 directed that:

Evidence may be adduced under the issues heretofore designated with respect to:

(1) the death of Richard Eaton;

(2) the person or persons to whom Richard Eaton's stock in United will be transferred under the terms of his will or the laws of intestate succession as may be applicable; and

[2] Spanish language.

(3) the pertinent background of each such transferee.

8. Conferences and evidentiary hearing sessions were held on various dates during the period November 18, 1980 through September 9, 1981. Proposed findings were filed January 11, 1982 and reply findings were filed January 27, 1982. The record was closed on March 4, 1982 (FCC 82M-0721).[3]

## *Findings of Fact*

### *United and WOOK(FM)*

9. The station now bearing the call sign WOOK(FM) was licensed to United on February 5, 1951 to operate on 95.9 MHz. In April of 1952 a license was issued authorizing the operation of the station on 100.3 MHz (United Ex. 67, p. 1). Prior to December of 1976, the station was identified as WFAN(FM); at that time the call sign was changed to WOOK(FM). WOOK was a call sign formerly used by another United AM station (District Ex. 11, p. 1).

10. Richard Eaton was the founder of United and, until his death on June 1, 1981, was its sole stockholder, president, treasurer, and chief executive officer; he was one of its directors (United Ex. 79, p. 1). The other directors, prior to Richard Eaton's death, were: Daniel Richard Eaton and Pierre Daniel Eaton, sons of Richard Eaton (United Exs. 2 and 4, p. 1); Elsa Eaton, widow of Richard Eaton (United Ex. 3); Gerald Joseph Hroblak (United Ex. 7); and Joseph George Schweighardt, Jr. (United Ex. 9). The officers other than Richard Eaton were Elsa Eaton, vice president (United Ex. 3); Clifton D. Holland, vice president (United Ex. 6); Gerald Joseph Hroblak, vice president, secretary, and controller (United Ex. 7); E. Carlton Myers, Jr., vice president (United Ex. 8); and Martha Stewart Byers, assistant secretary (United Ex. 1).

11. The general manager of WOOK(FM), at Richard Eaton's death, was E. Carlton Myers. He testified that he had served in that capacity since 1964 (United Ex. 8) but it appears that this was either a part-time or intermittent position (District Exs. 6, 8, and 9 which are United renewal applications). Gerald Hroblak apparently has no WOOK(FM) title, but acts in a management capacity in negotiating network contacts, accounting, and programming (United Ex. 7, p. 2). Clifton D. Holland, since December 1976, has been public affairs director (United Ex. 6; Tr. 694–701). Martha Stewart Byers does the WOOK(FM) routine bookkeeping as well as bookkeeping for all other United stations (United Ex. 1).

---

[3] Pages of the record will be cited as "Tr. ___ "; United's exhibits will be cited as "United Ex. ___ , p. ___ "; District's exhibits will be cited as "District Ex. ___ , p. ___ "; Hispanic's exhibits will be cited as "Hispanic Ex. ___ , p. ___ "; exhibits introduced jointly by all three applicants will be cited as "Joint Ex. ___ , p. ___ "; exhibits introduced jointly by United and District will be cited as "United/District Joint Ex. ___ , p. ___ ."

12. Richard Eaton's will was admitted to probate on June 8, 1981; on that date Suburban Trust Company and Dennison L. Mitchell were issued letters of administration (United Ex. 92, Attachments A and B). The will provides that the 311 outstanding shares of United stock are to be divided as follows: Gerald Hroblak—9 shares; William Parris—3 shares; Joseph Schweighardt—3 shares; Samuel Phillips, Jr.—3 shares (these shares are not to be distributed if the particular legatee is not a United employee at Richard Eaton's death and for five years thereafter); Suburban Trust Company and Dennison L. Mitchell as trustees—that part of the remaining 293 shares not redeemed by United for the purpose of paying taxes, funeral expenses, and administrative expenses (United Ex. 92, Attachments A and B).

13. The trust created by the will (which includes the residuary shares of United stock and other property) names 21 beneficiaries including Richard Eaton's wife, his former wife, sons Pierre and Daniel, eight daughters, eight grandchildren, and Gerald Hroblak. The trustees are authorized to pay from the income or principal of the trust such amounts as they deem appropriate to the beneficiaries. After the death of the former wife and the passage of ten years from the date of Richard Eaton's death, the trust is to be distributed to the remaining beneficiaries when each attains a stated age. The will gives the personal representatives and the trustees the power to sell United stock and to carry on the business of United. It recommends that Gerald Hroblak be the chief operating officer of United and other corporations (United Ex. 92, Attachment A).

14. STC is a publicly held Maryland bank with a trust department having experience in acting as personal representative and trustee and as such in the management of small businesses (United Ex. 92, pp. 7–9). Dennison Lewis Mitchell is a CPA and lawyer. Mitchell and his firm have represented Richard Eaton and United since 1950 (United Ex. 90).

15. On July 3, 1981, Gerald Hroblak was elected president, treasurer, and chairman of the board of United; Gary L. Gross was elected vice president; William Parris was elected vice president and secretary; Parris was also made a director.

*Programming of WFAN(FM) and WOOK(FM)*

16. Prior to December 24, 1976, the station broadcast in the Spanish language (District Ex. 11). The various renewal applications provide information as to programming during the periods covered by those applications. In the 1969 renewal application (District Ex. 6), the station's composite week (1966–1969) showed 21 minutes of public affairs programming, representing 0.3% of the total week.

The 1972 application (District Ex. 8) reflects public affairs programming for the 1969–1972 period as 30 minutes or 0.046%.[4] While little, if any of the 1966–1969 public affairs programming involved local affairs, the 1972 application shows that 25 minutes of the composite week 1969–1972 involved local affairs (District Ex. 8, p. 34). The 1975 application (District Ex. 9) indicates 1 hour, 30 minutes of public affairs programming (1%) during the composite week none of which was locally created.[5] The 1978 application (United Ex. 66) shows for the (1975–1978) composite week, 97 minutes of public affairs programming (1.08%) of which 57 minutes were locally produced. During this period (December 1976), the station switched from a Spanish to a Black format and the programs which were locally produced for a Spanish audience were dropped. An amended programming proposal was filed in January 1977 showing an intent to broadcast 194 minutes (2%) of public affairs programming (Ex. 16 to United Ex. 66) which was to include 2 hours, 30 minutes of local public affairs programming (Ex. 22 to United Ex. 66).

17. The 1969 application shows that for the composite week 8 hours and 49 minutes (8.2%) were devoted to news; in the 1972 application 8 hours and 15 minutes (7.48%) were so devoted; and in the 1975 application 19 hours, 38 minutes (16.0%) were shown. The 1969 application reveals that the station then utilized a Spanish-language wire service which provided news of particular interest to Spanish-speaking persons and that the news presented was about all national and inter-national news although the announcers acted as local news staff and the station broadcast some local news gathered by a sister station. The 1972 application continued a similar pattern relating to news except that there was instituted a new two-hour program beginning at 6 a.m. on Monday through Friday which included some local news (District Ex. 9, pp. 43–45). The expanded news programming reflected in the composite in the 1975 application showed 5-minute hourly broadcasts of news and that 95% of the news broadcast related to national and international events relating to Latin American countries.

18. Ivan Quinonas testified that he was employed by the station from the 1960s until the format change (Tr. 1732, 1765). He was advised by Richard Eaton that there was no money to provide more local news coverage (Tr. 1740, 1744, 1755). The station lost money in 1970, 1971, 1972, and 1975 with the losses ranging from $5,495 to $21,264. The years 1973, 1974, and 1976 were profitable with the annual net income running from $11,914 to $15,823 (United Exs. 77 and 87).

19. Copies of the logs for the periods covered by the 1969, 1972,

[4] An apparent error; probably should be 0.46%

[5] There is a discrepancy between pages 11 and 43 of the application with respect to whether the total is 1 hour and 13 minutes or 1 hour and 30 minutes.

and 1975 applications were not included in the exhibits (District Exs. 6, 8, and 9) so that it is difficult to tell much about the balance of the station's programming during those years. It does appear that the composite week covered in the 1969 application included 5 hours, 53 minutes (5.4%) for "all other programs, exclusive of entertainment and sports." It is also possible to ascertain that the station had some religious programming both locally produced and otherwise, a children's program in Spanish, a poetry program of both local and nonlocal origin, a program titled *Philosophy for Living*, and a locally produced sports show emphasizing Latin American sports.

20. In the 1972 application, the composite week included 9 hours, 10 minutes of "other" programming (8.49%) with components similar to those mentioned in the previous paragraph. In the 1975 application "other" programming was 5 hours, 45 minutes (5%). The components remained similar. The "other" programming reported in the 1978 application was 5 hours, 15 minutes (3.5%) (Ex. 16 to United Ex. 66).

*The December 1976 Format Change*

21. On December 24, 1976 the format of WFAN(FM) was changed from Spanish language to Black-oriented, the number of weekly broadcast hours was increased from 123 to 162, and the call sign became WOOK(FM). At the same time, the format of sister station WOOK(AM) was changed from Black-oriented to Spanish language programming and WOOK(AM) became WFAN(AM) (District Ex. 11, p. 1).

22. E. Carlton Myers testified that he suggested the format change to Richard Eaton in early 1975 because he felt that FM radio was emerging as a dominant medium over AM and Black listeners were moving to the suburbs where the nighttime signal of United's AM station was inadequate (Tr. 639–644). Myers believed that the Washington, D.C., Spanish-speaking population was mostly located in the Adams-Morgan area of Washington, which could be served by the AM signal. A series of meetings on the proposal were held with Myers, Richard Eaton, and other United people (Tr. 666–667, 644–647). The decision to change formats was made by Richard Eaton (Tr. 648, 1759). Myers and Hroblak denied that concern about possible adverse FCC action with respect to WOOK(AM) and WFAN(AM) motivated the changes (Tr. 644–650, 873–876).

*WOOK(FM) News Programming - December 24, 1976—August 31, 1978*[6]

23. At sometime during this period the station created a news staff of three full-time persons and one news director[7] (United Ex. 63, p. 73). One of the news staff was in the field daily and covered local events. The station had a newsroom with appropriate equipment, once had an affiliation with National Black Network and later with Sheridan Broadcast Network, and used Associated Press wire service (United Ex. 63, p. 74).

24. The regularly scheduled news broadcasts for the period from January 1, 1977 through August 31, 1978 were the following. From January 1 until February 22, 1978 there were 3-minute newscasts broadcast Monday through Saturday 26 times per day from 1:20 a.m. to 5:50 p.m. In addition, from February 7 through February 22, 1978 newscasts were broadcast from 6:00 a.m. to 7:00 a.m. and from 8:45 a.m. to 9:00 a.m. Monday through Saturday. From February 23, 1978 until August 31, 1978 3-minute newscasts were broadcast Monday through Saturday 22 times per day beginning at 1:20 a.m. and ending at 5:50 p.m. In addition, from February 23, 1978 until July 16, 1978 newscasts were broadcast from 5:50 a.m. to 7:00 a.m. and from 8:45 a.m. to 9:00 a.m. Monday through Saturday; and from July 17, 1978 until August 31, 1978 newscasts were broadcast from 5:45 a.m. to 7:00 a.m. and from 8:45 a.m. to 9:00 a.m. Monday through Friday, and from 5:50 a.m. to 7:00 a.m. and from 8:45 a.m. to 9:00 a.m. on Saturdays. The only regularly scheduled news program for Sunday, *Information Digest* was broadcast from 10:00 a.m. to 11:30 a.m. from February 6, 1977 to January 1, 1978; from 2:00 a.m. to 3:30 a.m. and from 10:00 a.m. to 11:30 a.m. from January 8 to July 31, 1978; and from 2:00 a.m. to 3:30 a.m. and from 6:00 a.m. to 7:30 a.m. from August 6 to August 31, 1978 (United Ex. 63, pp. 76–77).

25. Information Digest is roughly one-third locally produced by the station; the balance is Associated Press or Sheridan Broadcast Network in origin (United Ex. 63, p. 94).

26. The station also carried specially prepared news broadcasts concerning special events. In the period January 1, 1977—August 31, 1978 those broadcasts included election day coverage for the Washington area, a special report on the Supreme Court's *Bakke* decision, extended coverage of a long and newsworthy murder trial in Prince George's County, Maryland, Black History Month events, and nine over events of local interest (United Ex. 63, pp. 82–93).

27. The station, beginning in 1977, has broadcast *Commentline* on Monday through Saturday at 6:00 a.m. and 8:45 a.m. This is a

[6] The first date marks the format change; the second, the filing of the first competing application.

[7] The exhibit is not specific as to when the staff became as here described.

five-minute program during which listeners are asked to call in and comment on matters such as young runaways, drugs in the armed forces, treatment of patients in hospitals, mixed sexes in high school athletics, the electoral college, child molesters, etc. (United Ex. 63, pp. 109–204). A 3 $^1/_2$-minute report is given by the District Mayor's office at about 6:25 a.m. on each Tuesday (United Ex. 63, p. 205). A physical exercise program is conducted for 1 minute at 5:55 a.m. and for 2 minutes at 6:43 a.m. The frequency of the program is not stated (United Ex. 63, p. 205). A 1 $^1/_2$-minute report on job opportunities given by the D.C. Department of Employment Sources is broadcast daily with the news at 6:35 a.m. and 8:47 a.m. (United Ex. 63, pp. 205–206). From sometime in 1976 through the summer of 1980 a daily 1-minute program on how to save in the home was broadcast at about 5:45 a.m. by the District of Columbia Consumer Affairs Department (United Ex. 63, p. 206).

*Relative Position of WOOK(FM) Nonentertainment Programming Among Washington, D.C. Area Radio Stations*[8]

28. *Arbitron Radio Audience Estimates in the Arbitron Market of Washington, D.C.*, October/November 1980, defines the Washington, D.C. "Metro Survey Area" as Washington, D.C., Montgomery, Prince George's, and Charles Counties in Maryland, and Fairfax, Loudoun, Prince William, and Arlington Counties in Virginia. A total of 40 commercial AM and FM stations are licensed to communities within the Washington, D.C. Metro Survey Area (*id.*, p. 4). The programming analyses contained in the 1978 renewal applications of the Metro Survey Area stations for which records were available revealed that of 35 stations WOOK(FM) ranked sixth among Washington, D.C. stations and eighth overall with respect to total amount of news actually broadcast during the composite week analyzed. WOOK(FM) ranked fifth among Washington, D.C. stations, and tenth overall, with respect to the percentage of time dedicated to news programming during that composite week. Two of the four Washington, D.C. stations exceeding WOOK(FM)'s performance had formats featuring predominantly nonentertainment programming (*id.*, pp. 7–8).

29. Of 35 stations for which records were available, WOOK(FM) ranked seventh among Washington, D.C. stations and sixteenth overall with respect to the percentage of time dedicated to all nonentertainment programming during the composite week analyzed. Of the six Washington, D.C. stations whose performance exceeded WOOK(FM)'s three had specialized formats featuring predominantly nonentertainment programming. WOOK(FM) ranked ninth among Washington, D.C. stations and fifteenth overall

[8] Information set forth in this section is taken from United Ex. 76. Unless otherwise indicated, page references in parentheses refer to that exhibit.

with respect to the total amount of all nonentertainment programming actually broadcast during the composite week analyzed for 1978 renewal applications. Of the eight Washington, D.C. stations whose performance exceeded WOOK(FM)'s, three had specialized formats featuring predominantly nonentertainment programming (*id.*, pp. 9–10).

30. United prepared a program audit for the month of April 1978 because the composite week designated for the 1978 renewal application included dates both before and after the December 1976 WOOK(FM) format switch. The audit revealed that the percentages of all of the station's broadcast time during the month of April 1978 devoted to nonentertainment programming were as follows:

| | |
|---|---|
| News | 10.7% |
| Public Affairs | 2.4% |
| Other | 3.1% |
| Total | 16.2% |

31. In comparison to the percentages of such programming performed in the 1978 composite week by the 35 Washington, D.C. area stations for which records were available, WOOK(FM)'s April 1978 figures exceeded all but three other Washington, D.C. stations and three suburban stations with respect to news programming. Two of the three Washington, D.C. stations had nonentertainment formats. Similarly, WOOK(FM)'s April 1978 performance exceeded all but six Washington, D.C. stations and five suburban stations with respect to overall nonentertainment programming. Five of the stations which exceeded WOOK(FM) in this regard had formats featuring predominantly nonentertainment programming (Ex. 22 to United Ex. 66).

*WOOK(FM) Community Involvement*[9]

32. The following is a listing of WOOK(FM) community-related activities:

(a) From 1971 until 1979 a free class for training in radio broadcasting was held every Saturday. Two members of the current WOOK(FM) news department received their start from those classes (*id.*, p. 1).

(b) In 1977 the station assisted the Salvation Army in its Christmas-time drive to collect toys for needy children by providing announcements and other assistance in the project (*id.*).

(c) In 1977 the station co-sponsored the city-wide Community Mardi Gras Day in cooperation with the 14th Street Project Area Committee, Inc. The committee is appointed by the mayor to oversee projects undertaken to rebuild and revitalize the 14th Street corridor. WOOK(FM) assisted in recruiting help, donating awards, and planning stages of the event (*id.*, pp. 1–2).

[9] Information set forth in this section is taken from United Ex. 64. Unless otherwise indicated, page references in parentheses refer to that exhibit.

(d) In 1977 station WOOK(FM), in cooperation with several D.C. schools, conducted a high school attendance contest. The class achieving the best record won prizes provided by the station (*id.*, p. 2).

(e) In 1977 members of the sales and on-air staffs of the station spoke with several classes at Woodson High School on topics ranging from radio station formats to the importance of voice tone quality, and to radio advertising (*id.*, p. 2).

(f) WOOK(FM) donated 70 fight tickets to the Metropolitan Police Boys' and Girls' Clubs (*id.*, p. 3).

(g) At Christmas-time 1977, the station assisted the Temporaries Food for Christmas Collection effort through the broadcast of promotional information. The drive benefits local individuals who suffer personal disasters (*id.*, pp. 4–5).

(h) The station co-sponsored, promoted, and provided entertainment in connection with a Teen Benefit Disco co-sponsored by the D.C. Branch of the YWCA in June 1978 (*id.*, p. 7).

*Community Witnesses*

33. United offered the testimony of a number of community witnesses relative to WOOK(FM)'s community service. H.R. Crawford, a member of the District of Columbia City Council representing Ward 7, testified that WOOK(FM) "is one of the few remaining stations" catering to a group including some of his constituents (Tr. 1520). Charles Allison, a retired army officer now employed by the Federal Government said he was a "long-time listener" to the station and enjoyed *Commentline*. He also stated that WOOK(FM) offered good community service because it presents "the Black perspective without omitting general and important news stories" (*id.*). Warren Bartley, a counselor in a juvenile detention center, testified that the station provides useful information to the community and is aware of community needs. He singled out coverage of the juvenile justice system and the Oakhill Juvenile Detention Center, where Bartley is employed (United Ex. 44). Wallacetine Talafaro-Curtis, a program coordinator for a local alcoholism program, described the positive response she encountered with respect to her appearances in WOOK(FM) nonentertainment programming and praised the station's news service. She uses the employment information feature (United Ex. 46). Dr. Joan Hillsman, an educator in the D.C. public school system, testified that the station reaches a large number of the city's youth and provides them with a positive sense of cultural identity. She stated that she has incorporated the station's programming into her lessons (United Ex. 50). Jerome Jones, a director and former executive director of RAP, Inc., a community-based drug treatment and counseling organization, testified that WOOK(FM) has provided support for his organization's work in a number of respects and is above relative to the nature and extent of the cooperation it offers to RAP, Inc. (United Ex. 52). Joy Jones, an information and outreach specialist for Wider Opportunities for Women, testified about the greater degree of cooperation extended to

her by WOOK(FM) and the greater level of response she encounters to WOOK(FM) programming, in comparison to other stations with which she has worked, including WHUR, WOL, WMAL, WKYS, and WPGC (United Ex. 53; Tr. 769). Jasper Lawhon, a retired federal employee, testified that WOOK(FM) appeals to a broad spectrum of Blacks and is sensitive to issues that concern Blacks. It is an effective source of news and information that listeners otherwise would not get (United Ex. 56). Curtis J. Massey, an associate director for Youth Services and Advocacy at the Southeast Neighborhood House, Incorporated, testified that he is a long-time listener and a representative of an organization which has benefited from WOOK(FM)'s assistance. He said it provides excellent service to the Washington, D.C. community through its programming and its cooperation in community activities (United Ex. 57). Vickie Satern, president of an employment agency, testified that in assisting her efforts to publicize a CETA funded job program, WOOK(FM) demonstrated dedication to community service well beyond that of other stations in the area. She also ascribed much of the success of her program to WOOK(FM) (United Ex. 58). Reverend Annie Woodridge, the founder of a local community center, testified that WOOK(FM) has done an outstanding job and has brought happiness to people (United Ex. 61).

*Efforts by United to Provide Spanish-Language Programming to the Washington, D.C. Area*[10]

34. On April 22, 1978 when WFAN(AM) [formerly WOOK(AM)] went off the air it was providing a full-time Spanish-language radio service. Richard Eaton was experienced in Spanish-language programming, having operated WFAN(FM) as a Spanish-language station from the late 1950s through 1976. He also operated Spanish-language stations in New York, New York, San Gabriel, California, and Miami, Florida (United Ex. 77). United searched for but found no licensee willing to supply substantial blocks of programming time, including primetime or drive-time for Spanish-language programming. Station WEAM(AM), Arlington, Virginia, did contract with United for the broadcast over WEAM's facilities of Spanish-language programming from 11:00 p.m. - 6:00 a.m. Monday through Saturday.[11] United supplied and paid for the announcer and sales staff for the Spanish programming, participated in programming, and divided equally all sales revenues in excess of certain stated costs with WEAM. The arrangement, a money loser for United, was terminated by WEAM.

---

[10] Information set forth in this section is taken from United Ex. 78 unless otherwise noted.

[11] Josephine Ades, a Hispanic witness, testified that a group with which she was working in 1978 was successful in having the WEAM all-night show broadcast in Spanish (Tr. 2250).

35. Following the termination of the arrangement with station WEAM, United principals were unable to find blocks of time available for Spanish-language programming. United also held unfruitful discussions with a local Hispanic group which approached Eaton for financial help in purchasing a station (United Ex. 77, pp. 1–3; Tr. 3243).

36. On May 29, 1979 United entered into an agreement with Combined Community Communications, Inc. (Combined) under the terms of which Combined utilizes the subcarrier FM multiplex facilities of station WOOK(FM) to transmit programs and related services to the Spanish community. The service is to be provided between 6:00 a.m. and midnight. According to its president, Combined provides programming 7 days per week, with a total of 91 hours weekly. The programming, which consists of national and international news, public service announcements, religious material, sports and entertainment, is entirely in Spanish. United negotiated over a period of approximately one year with Pacifica Foundation about funding Spanish-language programming over noncommercial educational station WPFW(FM), Washington, D. C. Nothing resulted as the station was unable to provide the amount of programming which Eaton felt would be necessary.

*Testimony of Hispanic Principals Relative to WFAN(FM) Service*

37. Angel Roubin testified that he was "a regular listener to the Spanish-language programming of radio station WFAN for many years" and that virtually all Hispanics in the area "relied on WFAN for entertainment, information of local interest to the Hispanic community, and for international news from Hispanic countries" (Hispanic Ex. 3, pp. 2–4). Lourdes Raquel Miranda testified that she had long been a regular listener to the Spanish-language broadcasts of WFAN(FM) and WFAN(AM) and that their loss was tragic (Hispanic Ex. 4, pp. 9–10). Michael A. Erice testified that he had for many years been a regular listener to the Spanish-language programming of radio station WFAN, that he prepared and delivered a weekly 15-minute news program on the station during 1967–1968, that he utilized WFAN(FM) in the promotion of a movie theater in which he had an interest between 1962–1970 (Hispanic Ex. 5, pp. 3–6). Raquel Marquez Frankel testified that she believed the loss of the Spanish-language programming was a "tragic blow to Washington area Hispanics" (Hispanic Ex. 7, pp. 5–6). Adelina Pena Callahan testified to the same effect (Hispanic Ex. 8, p. 3).

*Notice of Apparent Liability*

38. On November 30, 1978 the Commission issued a Notice of Apparent Liability to United in connection with two contests, one of which, the *Black Book Contest*, was broadcast on WOOK(FM) during the period December 19, 1977 through January 29, 1978; the other,

*Thousand Dollar Dial Contest*, was broadcast on WOOK(FM) during the period January 20, 1978 through February 9, 1978. A forfeiture in the amount of $6,000 was assessed for three violations of the Commission's contest policies (District Ex. 20). United paid the fine with a check on the back of which was printed "Payment subject to terms & conditions set forth in letter to Federal Communications Commission of 1/19/79 which is being submitted with this check" (United Ex. 91, Attachment G). The referenced letter, from counsel for United, set forth United's position that the matters considered by the Commission in assessing the forfeiture were not violations and that: "Payment of the $6,000 fine as assessed should not be construed as either an admission by the licensee of the validity of the Commission's action or of the amount of the assessment." It also stated: "United Broadcasting recognizes that it has various avenues of appeal and challenge open to it. However, it is felt that payment of the fine, without admission of culpability, in the long run will save both the licensee and the Commission extensive amounts of time and money" (United Ex. 91, Attachment F).

*Black Book Contest*

39. The *Black Book Contest* instructed listeners to provide the station with their names and telephone numbers and those of three friends. Station personnel were to telephone names from those provided and, if the person called was then listening to WOOK(FM), the listener and the individual who had provided the listener's name would win a prize. The prizes to be awarded were not described.[12] The announcements indicated that winners would qualify to win in any WOOK(FM) contest conducted in 1978, when, according to the broadcast announcements relative to *Thousand Dollar Dial Contest*, that information was false (District Ex. 20).

40. The *Black Book Contest* was designed by William Parris, a United employee then serving as a programming consultant for WOOK(FM) (Tr. 3593–3594, 3609). He had experience in the design of broadcast contests (United Ex. 28; Tr. 3583). In the fall of 1977, he submitted a description of *Black Book Contest* to counsel for United who reviewed it primarily to determine whether any lottery was involved (Tr. 3634–3636; United Ex. 91, p. 1).

*Thousand Dollar Dial Contest*

41. The announcements broadcast for the *Thousand Dollar Dial Contest* stated that the station would telephone persons and if the person called was then listening he/she would win $1,000. One announcement repeatedly stated that calls would be placed to listeners in the Washington area, while United, in a letter to the

[12] WOOK(FM) said that winners were told what the prize was when they were called.

FCC, said that contestants were chosen from District of Columbia and Maryland telephone directories. Thus listeners in the Virginia suburbs of Washington could not participate.

42. *Thousand Dollar Dial Contest* was designed by United employee Parris (Tr. 3608–3609). He testified that it was his idea to use the Washington Metro Telephone Directory, although he does not know why WOOK(FM) staff used anything but the single directory captioned "Washington Metro Telephone Directory" (Tr. 3622–3623). United's Exhibit 93 contains copies of the covers of Washington, D. C. telephone directories from May 1976, May 1977, May 1978, and May 1979; each bears the legend "Washington Metropolitan Area." Whether the books contain Virginia numbers does not appear. United witness Parris testified that books with that legend contained Virginia numbers in the early 1970s (Tr. 3625).

*The WOOK(AM) and WFAB(AM) Renewal Proceedings*

43. The issue requires inquiry into the effect of the findings and conclusions by the Commission in two cases involving the failure to renew two United related licenses. That order also imposes the rule of collateral estoppel which bars the relitigation of "the questions surrounding (United's) operation of" WOOK(AM) and WFAB(AM). In that circumstance it is unnecessary to set out here much of what the Commission said in those cases. In order, however, to put in perspective mitigation efforts by United, the delinquencies found to exist by the Commission in United's operations of those stations will be briefly stated.

44. In the WFAB case[13] the Commission concluded that during the period January 1971-May 1972:

> . . . a violation of Section 73.1205 of our Rules had occurred because the licensee had failed to exercise reasonable diligence to see that its employees did not issue documents containing false information or misreprenting the nature or content of advertising broadcast on the station. We determined that the billing practices of WFAB's local management directly facilitated a fraudulent scheme perpetrated by a local retail appliance dealer, and that these practices of the local WFAB management were the direct result of the licensee's abandonment of control and supervision with respect to station billing practices.

The WFAB license was not renewed.

45. In the WOOK(AM) case,[14] the renewal application was denied because United was found unqualified. That conclusion was based on findings: (a) that various ministers used WOOK to broadcast offers of scripture citations which were really numbers game tips in return for donations; (b) that ministers used WOOK to broadcast offers of "roots," "baths," etc. with promises of financial

[13] *United Broadcasting Co. of Florida, Inc.*, 55 FCC 2d 832; reconsideration denied 60 FCC 2d 816.

[14] *United Television Co., Inc.*, 55 FCC 2d 416.

blessings and solutions to personal problems which were false and misleading and that United failed to take reasonable measures to prevent such use of its facilities; (c) that in spite of having notice from the Federal Trade Commission that it was investigating the veracity of the advertisements of Empeco, a WOOK advertiser, United failed to conduct any inquiry respecting the ads; (d) that "advertising carried for Richard Eaton's book . . . did not conform to guidelines established by the Federal Trade Commission for determining the regular selling price for items offered at discount"; (e) that United repeatedly violated Commission technical rules for which a $7,500 forfeiture was assessed. Even so "in reliance on representations that its future operations would be in compliance with the technical rules, United's license was renewed, [citation omitted]. Notwithstanding the forfeiture and its representations, the violations continued. A subsequent inspection on September 3, 1969, disclosed 19 violations of the Commission's rules [fn. omitted]." The Commission further found: "that United's past representations were of no value, that no reliance can be placed on its present promises of future compliance, and that there are no mitigating factors."

*Evidence Offered by United in Mitigation*

46. In the mid-1970s Richard Eaton began delegating some of his authority to a number of persons. Gerald Hroblak, assistant controller of United until 1972, became controller in 1972, a director in 1974, and secretary in 1976. William Parris, who was in charge of United's Baltimore stations, was made national program director in 1978. In October 1977, Gary Gross was hired as director of operations to develop and implement policies and procedures for United stations relative to compliance with Commission rules and policies. Gross makes regular visits to all of United stations and maintains contact with station personnel. United retained Arent, Fox, Kintner, Plotkin and Kahn (Arent Fox) as its communications counsel in December 1976. They consulted with United's headquarters personnel; station personnel were encouraged to confer with them if questions arose about which an attorney's advice might be helpful. In 1977 or early 1978, United's consulting engineers began to make unannounced periodic technical inspections of its various stations.

47. In 1973 United established a central billing procedure whereby the bills to advertisers on all United stations were issued by a headquarters office. The bills were based on station logs which showed advertisements actually run (United Ex. 79, pp. 7–10). In the late-1970s United began an educational program respecting the elements of a lottery directed to its various station employees. This was conducted by attorneys retained by United and by the United employee Gross. In addition Gross has provided written and oral direction to the local stations (*id.*, p. 10). In 1978 Gross and Arent Fox began developing and implementing procedures relative to

contests. The procedures were issued in writing in August 1978 and require that a station which wants to run a contest submit detailed information thereon to Gross or to counsel. If the contest proposal survives review it is required to be run without script changes. Employees may be, and have been reprimanded or temporarily suspended for failure to comply with these policies (*id.*, pp. 11–14). Gross and counsel are also available to local station personnel to answer inquiries respecting advertising (*id.*, pp. 15–16). Though it is not clear when the policy was adopted, United prohibits the receipt by an employee of anything of value in connection with the broadcast of any matter. Employees are required to sign an affidavit each quarter that they have complied with the policy. Visits to stations by record promoters are carefully controlled and logged. Gifts of records in excess of those needed for broadcast are not accepted (*id.*, pp. 16–17). United management persons holding first-class radio-telephone licenses check the stations for technical compliance and offer instruction (*id.*, pp. 17–18).

*District Broadcasting Company*

48. District is a corporation organized for the purpose of seeking the FM license here considered. It has authorized issuing 20,000 shares of stock to the following individuals, all of whom are Black; they hold the specified corporate offices and directorships:

> R. Kenneth Mundy, president, director 25% subscriber; Ridgely C. Bennett, vice president, director, 25% subscriber; Herman F. Stamps, secretary, director, 25% subscriber; Francis L. Smith, treasurer, director, 25% subscriber.

49. District's application contains a provision for a standby generator to serve as a source of power during an emergency so as to maintain broadcast service (District Ex. 1, p. 1). Neither District nor any of its officers, directors or shareholders have any ownership interest in any medium of mass communication (District Ex. 2, p. 7; Ex. 3, p. 2; Ex. 4, p. 3; Ex. 5, p. 2).

*Biographies and Proposals of District Shareholders*

*Herman F. Stamps*

50. Dr. Stamps was born in Washington, D. C., on January 20, 1924. He has resided in the District all of his life except for the time he served in the Army and some time spent in school. He graduated from Howard University with a Bachelor of Science degree in 1945 and from the College of Dentistry in 1948. Except for the period 1956–1965, Dr. Stamps has taught dentistry at Howard. He has also held various administrative positions in the College of Dentistry and has been coordinator: facilities, systems and planning since 1970 (District Ex. 2, p. 1). Stamps is also self-employed as a practicing dentist in the District of Columbia (Tr. 973; District Ex. 2, p. 1).

51. Stamps has been active in District of Columbia civic affairs;

he has been committee chairman, Armstrong Neighborhood Federal Credit Union, 1960; committee chairman, officer and director, Washington Urban League, 1957–1966; director, "We Salute" Youth Enrichment Program, 1963–1970; committee chairman, Health and Welfare Council, 1967–1969. He was a candidate for Board of Education, Washington, D.C., in 1967 (District Ex. 2, pp. 4–5).

52. If District is successful in this proceeding, Stamps will become its full-time (40 hours) station managing director. He will devote no more than six hours each week to consultant services, will no longer maintain a private dental office, and will resign his current full-time position as coordinator: facilities, systems and planning at Howard University (District Ex. 2, pp. 1–5).

53. When the District application was filed it showed no staff position for Stamps (Tr. 981) nor did it propose any other District principal for involvement in the day-to-day management of the station (Tr. 1132–1133). The applicant's proposed positions did not include a managing director (Tr. 1257–1259). On March 14, 1979 District filed an amendment which indicated that Stamps would be full-time managing director (Tr. 1008–1010). Sometime after September 1, 1978 District counsel advised the group that Hispanic had filed its application and that it contained an integration proposal. District's counsel discussed with District principals the standards pursuant to which the Commission decides comparative renewal cases and explained the Commission's integration criterion (Tr. 1130–1133, 1230–1242). A decision that Stamps would be managing director was made at a meeting which District's counsel attended; he was "overjoyed" at the idea (Tr. 1089). The group knew that Stamps' involvement would be a plus for their application (Tr. 1247–1248). When the District amendment reflecting Stamps' role as managing director was filed the District group "had not gone into detail on the exact functions of the Managing Director and did not fully discuss the functions of Dr. Stamps until early 1981" (Tr. 1216, 1252).

54. District indicates Stamps' functions will be: "(1) to direct the formulation, interpretation, and communication of corporate policies and objectives; (2) to develop and maintain a sound plan of organization and provide for management development which will assure the continuing effective management of the company; (3) to direct [District's] long-range strategic planning and determine in conjunction with the Board of Directors the allocation of corporate resources in a manner which will provide maximum public service and optimum long-term return on investment for stockholders; (4) to be the Chief Executive Officer and Financial Officer of [District]; (5) to prepare and submit to the Board of Directors recommended budgets; (6) to act as [District's] principal spokesman and liaison with the community and groups the station will be serving; (7) to be responsible for directing continuing ascertainment of the needs and interests of the communities served by [District's] station; (8) to

approve and sign, subject to the approval of the Board of Directors, agreements with employee groups and labor unions; (9) to approve personnel policies" (District Ex. 2, p. 6; Tr. 1022–1023).

55. District's staff proposal includes a general manager. However, as the managing director, Stamps will take over a number of administrative duties which one might assume would otherwise have been handled by the general manager, e.g., personnel, physical plant, budgeting, and liaison with the board (Tr. 1033–1036, 1149–1150, 1162–1168, 1218, 1221, 1258–1259). Prior to the time Stamps was proposed as the managing director, it was the general manager who would have performed these functions (Tr. 1150–1151). The general manager will report to Stamps (Tr. 1036).

56. Since 1970 Stamps has been the coordinator: facilities, systems and planning for the Howard University College of Dentistry (District Ex. 2, p. 1). He testified that his responsibilities included assuring compliance with Occupational Safety and Health Administration (OSHA) regulations (Tr. 977–979). OSHA inspected the Howard University College of Dentistry between August 31, 1978 and September 7, 1978 (United Ex. 70). As a result of that inspection, OSHA alleged that the college had committed more than 60 OSHA violations (United Ex. 70; Tr. 1048). Stamps said that the OSHA allegations were not matters which fell under his specific control as his duties as coordinator were those of a clearinghouse (Tr. 1058–1059).

*Ridgely C. Bennett*

57. Dr. Bennett has resided in the District of Columbia since 1950. He graduated from Howard University Medical School in 1955 and has been licensed to practice medicine in the District of Columbia since 1956. Dr. Bennett is a member of four District hospital staffs. He holds a teaching appointment at Georgetown University Medical School and has taught at Uniformed Services University School of Medicine in Bethesda, Maryland (District Ex. 3, p. 1). Dr. Bennett is a medical officer for the Food and Drug Administration and maintains an active private practice with offices in the District. He belongs to professional societies and several alumni and civic groups. In the event that District's application is granted, Bennett will serve on District's program board. He will devote four hours each week in preparing for and participating in the meetings of the board (District Ex. 3, pp. 1–2).

*R. Kenneth Mundy*

58. Mr. Mundy received a Bachelor of Law Degree in 1957. He has been in private law practice in the District of Columbia since 1965. He was employed as an attorney for the Federal Communications Commission from 1957–1965 (District Ex. 4, p. 1).

59. Mr. Mundy has served as: member of various bar related

committees; member, American Civil Liberties Union; member, board of directors, Merriweather Home for Children; member, board of directors and of the executive committee, Citizens Communications Center; attend as delegate/member World Peace Through Law; and member of various professional groups (District Ex. 4, pp. 1–3). In the event that District's application is granted, Mundy will serve as a member of District's program board. He will devote four hours each week in preparing for and participating in meetings of the board (District Ex. 4, p. 3).

*Francis L. Smith*

60. Dr. Smith has been a life-long resident of the District of Columbia. He graduated from Howard University Medical School in 1950. Smith has been employed since 1975 as a medical officer and then as chief medical officer of the District of Columbia Department of Corrections and has had an active practice in the District of Columbia in orthopedic surgery since 1957. Smith was a founder of the Independence Federal Savings and Loan Association in Washington, D.C., and has served as a director of that association since 1968. He is a member of the Washington, D.C. Chapter of the NAACP, of the Urban League, and the YMCA. He is also a member of various professional societies. In the event that District's application is granted, Smith will serve as a member of District's program board. He will devote four hours each week in preparing for and participating in meetings of the board (District Ex. 5, pp. 1–3).

*Hispanic Broadcasting Corporation*

61. Hispanic is a corporation formed for the purpose of filing the application under consideration. It has authorized issuance of 300 shares of stock. The stock subscribers, officers, and directors of Hispanic, all of whom are Hispanic, are:

> Angel S. Roubin, chairman, director, 80% subscriber; Fernando Casillas, treasurer, director, 5% subscriber;[15] Michael A. Erice, secretary, director, 4% subscriber; L. Miranda King, president, director, 3% subscriber; Arturo Valle, vice president, director, 5% subscriber; Adelina Pena Callahan, assistant treasurer, director, 1.3% subscriber; and Raquel Marquez Frankel, assistant secretary, director, 1.7% subscriber.

62. If the Hispanic application is granted, the corporation

[15] On January 15, 1981 Hispanic tendered an amendment to its application representing that Fernando Casillas had resigned as officer and director and was no longer a stockholder. For purposes of the comparative issue, Casillas is considered to retain the positions he held with the corporation as of May 2, 1979 (Tr. 1461–1464). In an amendment tendered on June 25, 1981, Hispanic represented that Arturo Valle had replaced Casillas as treasurer and that his stock interests had been acquired by L. Miranda King, Adelina Pena Callahan, and Raquel Marquez Frankel. These latter individuals now are subscribers to 15 shares (5%), 9 shares (3%), and 9 shares (3%), respectively.

intends to employ a general manager with experience in the operation of Spanish-language broadcasting stations and a staff of Spanish-speaking professionals to operate the station. The board of directors will establish policies. The president will have the primary responsibility for directing the staff on a day-to-day basis, and she will devote a minimum of one hour per day at this task. A programming committee consisting of Miranda, Roubin, Frankel, and Erice will review the programming of the station and implement changes and modifications to it. A financial committee composed of Miranda, Roubin, Erice, Callahan, and Valle will supervise the financial operation of the station (Hispanic Ex. 4, p. 13).

*Angel Roubin*

63. Angel Roubin was born on January 15, 1935 in Ponte Vedra, Spain. The first language he learned was Spanish. On August 20, 1951 he came to the United States and worked thereafter in construction. In 1962 he and a cousin formed a company which contracts stone construction work nationwide and does general construction in the Washington area (Hispanic Ex. 3, pp. 1–2). Roubin is a founder of the Hemisphere National Bank of Washington, D.C., and is a stockholder, a member of the executive committee, and vice chairman of its board of directors. He is also a member of the board of directors of the Greater Washington Ibero-American Chamber of Commerce of Washington, D.C. He has been president and a member of the board of the Hispanic American Contractors Association. He lives in McLean, Virginia, and has resided continuously in the Washington area since 1962 (Hispanic Ex. 3, p. 2). Roubin has no interest in any medium of mass communications (Hispanic Ex. 3, p. 4).

*Lourdes Raquel Miranda (King)*

64. Lourdes Raquel Miranda was born September 20, 1938 in Puerto Rico and is of Spanish descent. Spanish was the language she first learned. After graduation from high school in Puerto Rico, she entered the University of California at Los Angeles, where she received a Bachelor of Arts degree in 1959. She also has a Master of Arts degree in Spanish Language and Literature. She has lived in Washington, D.C. since 1966 except for parts of the period 1969–1971. Miranda was a founder, president, and director of the National Conference of Puerto Rican Women, an organization devoted to the equal rights of Puerto Rican women in the United States (Hispanic Ex. 4, p. 4). She organized and led the First Hispanic Community Conference, sponsored by the Montgomery County, Maryland, public schools and served as a consultant on Hispanic culture for Montgomery County and Prince George's Counties, Maryland, public schools. She was also chairperson of the Montgomery County Public Schools' Hispanic Task Force which advised the schools on programs related

to Spanish-speaking students. She has also been a frequent speaker and panelist on questions of interest to the Spanish community and on various social questions and has been a consultant on a variety of social problems. In 1975 Miranda founded an educational and social research consulting firm. She founded and is president of the Association for Cross Cultural Education and Social Studies, Inc. (ACCESS), a private educational, nonprofit organization which particularly focuses on the concerns of women, minorities, the aged, the handicapped, and the socially and economically disadvantaged (Hispanic Ex. 4, p. 7). Her civic activities include membership on the board of directors of a number of business, social, educational, and communications organizations.

*Michael A. Erice*

65. Erice was born on December 22, 1922 in Cuba, the son of Cuban nationals. The first language he learned was Spanish (Hispanic Ex. 5, p. 1). On January 15, 1948 he and his wife came to the United States as permanent residents. For much of the time since 1954 he has been employed in news related occupations. He has also had an ownership interest in and managed a theater in Washington, D.C., which showed Spanish, Mexican, Argentinean, Arabian, and Chinese films. Since 1971 Erice has been a health and life insurance underwriter (Hispanic Ex. 5, pp. 4-5). He has been a member of various journalistic related organizations and other Hispanic related and business related organizations. He now lives in Falls Church, Virginia, and has been a resident of the Washington area on a continuous basis since 1959 (Hispanic Ex. 5, p. 5). He will devote at least one hour of each day to the supervision of the proposed station's local sales efforts. He will be a member of the financial and programming committees of the board of directors of Hispanic and proposes to spend from three to five hours each month on the work of each of these two committees (Hispanic Ex. 5, pp. 6–7). Erice does not own or have any interest in or connection with any existing media of mass communications.

*Arturo Valle*

66. Arturo Valle was born in Guatemala on April 6, 1928. His parents were natives of Guatemala. The first language he learned was Spanish. In September 1947 Valle came to the United States. He became a U.S. citizen in 1953 (Hispanic Ex. 6, p. 1). Together with a partner he founded a travel agency in 1958 which existed until 1961, when he established his own travel agency which he now owns and operates. Valle resides in the Adams-Morgan section of Washington, D.C., and has resided in the Washington area continuously since 1951. He has been a member of a Washington, D.C. chapter of the Lions Club since 1961. In 1977 he was appointed to the Latino Community Development Commission by Mayor Walter Washing-

ton. In 1977 he became a founding member of the executive board of the Greater Washington Ibero-American Chamber of Commerce. From 1975 to 1977 he was a member of Inter-American Businessmen's Association of Washington, D.C. He is also a member of several professional organizations. If Hispanic's application is granted, Valle will become a member of the financial committee of the board of directors and devote a minimum of five hours per month to the work of this committee. He does not own or have any interest in or connection with any existing media of mass communications (Hispanic Ex. 6, p. 4).

*Raquel Marquez Frankel*

67. Raquel Marquez Frankel was born on May 14, 1923 in El Paso, Texas, the daughter of Mexican immigrants to the United States. She graduated from St. Joseph's College, Albuquerque, New Mexico, received a Master's degree in social work from Loyola University, and has done graduate work in group therapy and physco-drama at the Psychiatric Institute Foundation of Washington, D.C., at the University of Maryland, and at the Institute for Policy Studies (Hispanic Ex. 7, p. 1). In 1962 Frankel moved to Washington, D.C., where she became a probation officer for the juvenile court system. From 1964 to 1966 she was a consultant for the United States Department of State, Alliance for Progress (Hispanic Ex. 7, pp. 2-3). She is now the Washington representative for *Nuestra* magazine. She lives in the northwest section of Washington, D.C., and has resided in the Washington area continuously since 1961 (Hispanic Ex. 7, p. 4). She has engaged in numerous civic activities, many of which have been involved with the Hispanic community. Frankel will spend a minimum of five hours per month on the work of the programming committee of the board of directors for the proposed station. She does not own or have any interest in or connection with any existing media of mass communications. At the time of the hearing, Frankel's husband had an interest in a corporation which held a construction permit for an unbuilt television station in Delaware. However, that corporation has since informed the Commission that it does not desire to construct the station.

*Adelina Pena Callahan*

68. Adelina Pena Callahan was born on January 12, 1935 in Washington, D.C. She has lived all of her life in Washington and attended Maryland and Georgetown Universities where she studied history and languages. In 1962 she and her husband opened a restaurant in Washington which they sold in January 1981. In September 1976 they purchased a second restaurant which she now helps manage. She has agreed to serve on Hispanic's financial committee of the board of directors and will devote at least five hours

per month to the work of this committee. She does not own or have any interest in or connection with any existing media of mass communications (Hispanic Ex. 8, pp. 1-4).

*The Reporting Issue Concerning Hispanic*

69. The issue was added on the basis of an allegation by United that then Hispanic stockholder Fernando Casillas had been found guilty of the commission of a crime, but that paragraph 8(d) of Section II of Hispanic's application indicated that none of its principals had been found guilty by any court of any felony or other crime (Hispanic Ex. 11, p. 2).

70. In the early summer of 1978 Casillas and the other principals of Hispanic received from their counsel a questionaire which included the following question:

> 4. Have you or any firm you have been associated with ever been found guilty by any court or administrative body of (1) any felony, (2) any crime, not a felony, involving moral turpitude . . . (Hispanic Ex. 10, pp. 1-2).[16]

71. Casillas contacted his attorney, a Mr. Brennan who had represented him in a criminal investigation, and asked if a plea of guilty he had entered in that investigation should be reported in answer to the question (Hispanic Ex. 9, p. 3). Brennan informed Casillas that the court's acceptance of his plea of guilty did not amount to a conviction of either a felony or a lesser crime involving moral turpitude and Casillas could truthfully answer this question "no" (Hispanic Ex. 12, pp. 3–4).

72. During 1975 and 1976 the Office of the United States Attorney for the District of Columbia conducted an investigation into contracts for printing between various government agencies and several local printing businesses including Casillas Press principally owned by Fernando Casillas. Casillas cooperated with the government in its investigations (Hispanic Ex. 9, p. 2; Ex. 12, p. 1) and on Brennan's advice, pled guilty to a violation of 18 U.S.C. 209(a), which, defines as a crime the payment to a government employee of money in exchange for services. This is a misdemeanor. Casillas completed the questionnaire given him by Hispanic counsel and answered the question concerning criminal convictions "no" (Hispanic Ex. 9, pp. 3–4; Tr. 1666–1667, 1669, 1681, 1684–1685).

73. The Hispanic application contained the answer "no" to question 8(d) of Section II which asked if "the applicant or any party to this application [had] been found guilty by any court of (1) any felony or other crime . . . ." The application was signed by Hispanic principal Lourdes Miranda. At the time she placed her signature on the application, she believed that the answer to the question was

[16] The language following the number (1) tracks Form 301 as it was several years ago.

true and was not then aware that Casillas had been charged with or convicted of any crime (Hispanic Ex. 10, p. 2). Until United filed its petition to enlarge issues in this proceeding neither counsel for the applicant nor any of its principals was aware of the Casillas conviction (Hispanic Ex. 10, p. 3; Tr. 1791, 1922, 1978, 2015, 2064; United Ex. 83, pp. 25, 41; District Ex. 21, p. 12; Hispanic Ex. 9, pp. 3–4).

74. Miranda testified that Hispanic relied upon counsel to prepare the application. She had never seen counsel's forms completed by the other principals. Counsel was responsible for distributing, collecting, and ensuring the accuracy of these forms. She did not read the application carefully prior to signing it. She did not compare the counsel's forms with the questions of Form 301 (Tr. 2432–2434, 2437–2438, 2461). Michael Erice testified that "in the final analysis," counsel was responsible for the accuracy of information provided (Tr. 2072–2073).

*The Washington Area Hispanic Community and Its Needs and Problems*

75. Washington, D.C., Montgomery and Prince George's Counties in Maryland, Arlington, Fairfax, and Prince William Counties in Virginia, and the cities of Alexandria, Fairfax, and Falls Church in Virginia contain 91,216 people of "Spanish origin" according to the 1980 U.S. Census (Hispanic Ex. 3, p. 3; Ex. 25, p. 4; Ex. 26, pp. 4–5, 7–8). Hispanic's proposal would provide primary service to all of these people except for 164 persons of Spanish origin residing in Prince William County, Virginia and to 2,000 or more Hispanics who live beyond these areas (Hispanic Ex. 31, p. 2).

76. The census indicates that the Hispanic population of the city of Washington grew from 2% of the population in 1970 (15,108) to 2.8% of the population (17,652) in 1980. Surveys of Hispanics in the Maryland counties taken shortly before the census indicates that there were between 26,000 and 29,000 Hispanics in Montgomery County versus the 22,790 indicated by the census and about 22,000 Hispanics in Prince George's County versus the 14,421 counted by the census (Hispanic Ex. 22, p. 5; Ex. 27, p. 5; Ex. 23, p. 2).

77. The 1980 Census demonstrates a growth in the Hispanic population of the Washington area which lost in total population over the past decade. In addition to growth in Washington and the Maryland suburbs, the Hispanic population in the Virginia portion of the Washington SMSA increased from 1.6% to 3.4% of the population, a growth greater than that of the total population.

78. the educational backgrounds of Washington area Hispanics vary from the illiterate recent immigrant to the well educated and their socio-economic positions are similarly varied (Hispanic Ex. 17, pp. 1–2). Of the 18,000 persons provided service by the Spanish Catholic Center during 1980, many are from Central American

countries and are political refugees. Many are functionally illiterate, even in Spanish. Without English they remain at the lowest economic level (Hispanic Ex. 16, pp. 2–3; Tr. 2618–2619, 2397). These immigrants tend to be young adults with large families. For every funeral provided by the Catholic Church, 50 baptisms are performed (Hispanic Ex. 28, pp. 2–3; Ex. 19, p. 3; Ex. 16, p. 2). Hispanics in the Washington area tend to move from the District of Columbia to the suburbs as their economic situation improves. Slightly more than 20% of the Hispanics in the two Maryland counties moved there from the District of Columbia (Tr. 2872, 3743–3744; Hispanic Ex. 22, p. 38; Ex. 23, p. 37).

79. The foremost common trait of the population is the use of the Spanish language which is the overwhelming language of choice in the home and socially. About 90% of Hispanics in the Maryland counties spoke Spanish in the home and more than 60% spoke no English at all in the home although all Hispanics surveyed spoke some English. An overwhelming majority of Hispanics desire bilingual education (Hispanic Ex. 16, pp. 1–2; Ex. 17, pp. 4, 7; Ex. 22, pp. 21, 29, 39; Ex. 23, pp. 7, 13, 19, 39, 61; Ex. 28, p. 3; Tr. 2403, 2406–2407, 2410).

80. Father O'Malley estimates that about 25% of Hispanics in the city have no knowledge of spoken or written English and that about 50% have no knowledge of written English. Ms. Gillespie of the D.C. Office of Latino Affairs has observed similar deficiencies among Hispanics in the Adams-Morgan area of the city. Dr. Zayas of the D.C. Schools stated that these estimates are true throughout the Washington area for the most recent Hispanic immigrants (Hispanic Ex. 28, p. 3; Ex. 16, p. 2; Tr. 2403). About half of Montgomery and Prince George's Hispanics have problems in the English language. Hispanics perceive that lack of English proficiency is their most serious problem. Maryland demographic studies demonstrated a high direct correlation between English language proficiency and average income (Hispanic Ex. 22, pp. 31, 60, 64; Ex. 23, pp. 22, 39, 60, 69, 72).

81. The average annual income for Hispanic households in Montgomery County in 1980 was $14,754 as against the 1976 median annual income for all Montgomery County households of $27,850 (Hispanic Ex. 22, pp. 57–58; Ex. 23, p. 50). At the time of the Maryland surveys, 12.1% of the Hispanics in Montgomery County were unemployed versus 5% of the general population. In Prince George's County, 16% of Hispanics were unemployed versus 4% of the general population (Hispanic Ex. 22, pp. 44–45; Ex. 23, pp. 47–48). The median educational attainment of adult Hispanics in the two counties is approximately ten years. In Washington the average educational level attained by adult Hispanics is eight years and fewer than one in four Hispanics has the equivalent of a high school education. However, 37% of Montgomery Hispanics and 25% of

Prince George's Hispanics have completed more than one year of college. About 80% of Montgomery Hispanics received the major part of their education in other countries, while the figure was almost 90% for Hispanics in Prince George's County (Hispanic Ex. 19, p. 2; Ex. 22, p. 41; Ex. 23, p. 43).

82. Many Hispanics are not aware of social services which exist and many are unaware of the availability of medical and dental programs (Hispanic Ex. 19, p. 3). The Maryland studies showed that over 75% of the Hispanics in Prince George's County were unaware of rent assistance programs. Over 70% of Hispanics believed that there was a need for much improved dissemination to Hispanics of information on county programs (Hispanic Ex. 23, p. 67).

*The Existing Mass Media's Efforts to Serve the Hispanic Population*

83. The English language media provides poor coverage of subjects about which Hispanics desire to have information. While events in Spain and Latin America receive attention, reports on these events are cast in terms of their effect on the interests of the United States. Other developments concerning the economic, political, social and cultural life of Hispanic countries are rarely covered (Hispanic Ex. 17, pp. 7–8; Ex. 13, p. 9). Hispanics do not follow the English language media to the extent the rest of the population does (Hispanic Ex. 13, pp. 2, 6; Ex. 15, p. 5).

84. There are a substantial number of Hispanics who are functionally illiterate in Spanish. The Spanish Catholic Center publishes a monthly or sometimes bi-monthly newspaper, *El Pregono*, which carries items of interest to the Hispanic community, but it has a very limited circulation. There is also a commercially produced monthly newspaper, *Latino*. A weekly Spanish language paper *Hispano* was published for a short period of time but failed because it carried very little local news and instead concentrated on national and international events of interest to Hispanics (Hispanic Ex. 16, p. 2; Ex. 28, p. 5; Tr. 2922–2923). Two or three Spanish language papers ceased publication over the past few years. The locally published Spanish language media lacked the resources to cover the entire community and since they were not published on a daily basis, they were unable to provide Hispanics with current information (Hispanic Ex. 13, p. 4; Tr. 2234, 2236, 2258).

*The Spanish Language Programming of Existing Broadcast Stations*

85. Several television stations within the Washington area broadcast occasional Spanish language programming:

(a) WRC-TV broadcasts a bilingual (English/Spanish) public affairs program each Saturday morning at 7:00 a.m. and a one half hour public affairs Spanish

language program, *Latin Tempo*, on each Sunday at 8:00 a.m. (Hispanic Ex. 13, p. 1; Ex. 30, p. 10).

(b) WHMM (EdTV) broadcasts *Carrascolendas* a Spanish language half hour educational network cultural program for Hispanic youth on Friday at 4:00 p.m. and *Mundo Real* a half hour network produced bilingual dramatic program broadcast Monday through Friday at 4:30 p.m. (Hispanic Ex. 30, p. 21).

(c) WETA-TV (EdTV) broadcast these Spanish language programs during the week of June 22–29, 1981: *Villa Alegre*, a bilingual half hour network produced program broadcast each Monday through Friday at 5:30 p.m. to educate Spanish youth in human relations, the environment, nutrition, energy, and man-made objects; *Mundo Real* (see preceding paragraph); *Presente*, a half hour news and entertainment program broadcast on Saturday at 2:30 p.m.; *Pochtlan*, a 30-minute weekly network produced program to teach English to Spanish speaking adults broadcast each Saturday at 2:00 p.m. During Hispanic Heritage Week, the station has broadcast four to five hours of Spanish language, network produced or syndicated programming covering Hispanic culture and arts (Hispanic Ex. 30, pp. 25–31).

(d) WJLA-TV broadcasts *Revista*, a local Spanish language public affairs/news program of one half hour length on Sundays at 2:30 p.m. and Fridays at 6:30 a.m. (Hispanic Ex. 30, pp. 13–14).

(e) WTTG-TV broadcasts a locally produced 30-minute Spanish language public affairs program at 2:00 p.m. on the last Friday of each month (Hispanic Ex. 16, p. 1; Tr. 2392).

(f) WDVM-TV broadcasts *Prisma*, a locally produced 30-minute Spanish language public affairs program each Saturday at 2:00 p.m. (Hispanic Ex. 30, p. 33).

(g) WDCA-TV has broadcast Spanish language public service announcements in the past (Hispanic Ex. 30, p. 37).

86. Several area radio stations broadcast occasional Spanish language programming. These stations and a description of that programming are:

(a) WPFW-FM broadcasts one Spanish language program, *Salsa de las Americas*, news and music from Central and South America on Sundays from 3:00 p.m.—6:00 p.m. (Hispanic Ex. 30, p. 72; Ex. 28, pp. 4–5).[17]

(b) WFAX (daytime only) broadcasts two 15-minute recorded religious programs in the Spanish language each Saturday from 2:15 p.m.—2:45 p.m. (Hispanic Ex. 30, p. 111).

(c) WJMD broadcasts public service announcements in Spanish (Hispanic Ex. 30, p. 176).

(d) WHUR broadcasts a Spanish language program, *The Latin Flavor*, on

[17] This station also broadcasts several English language programs designed to appeal to the Hispanic community. These programs are:

*Puentes*, a call-in format program broadcast on Wednesdays at 1:30 p.m.; *Voces Centro Americanas*, an English language news and information program concerning Central America broadcast at 2:30 p.m. on Wednesdays; *Caribbeana*, a news and music program broadcast in the English language on Saturdays from 2:00 p.m.—6:00 p.m.; and *Caribbean Roots*, an English language information and music program broadcast on Mondays from 5:00 a.m.—7:00 a.m. (Hispanic Ex. 30, p. 72).

Saturdays from 5:00 p.m. to 7:00 p.m. The program is predominantly music, but the host usually interviews a guest for about 10 minutes (Tr. 2665–2666; Hispanic Ex. 28, pp. 4–5).[18]

(e) WGTS broadcasts *Houra Latina*, a 1-hour Spanish language program each Monday through Thursday at 8:00 p.m. The program is locally produced and deals primarily with public service topics but includes some entertainment (Tr. 2696–2697; Hispanic Ex. 25, p. 4). It also broadcast *Domingo Radio Latina*, a 1-hour Spanish language religious program broadcast at 8:00 p.m. on Sundays.

87. There are two other communications services in the Washington area which provide Spanish language programming:

(a) Los Cerezos Tele-Vision Company operates a "Full-Time Experimental Television Translator" station on television channel 56 providing 24-hour Spanish language programming originating from studios in San Antonio, Texas. These programs include sports, entertainment, international and national news, talk and variety, children's programs and religion. Local programming is not provided. The signal is directed toward the Adams-Morgan section of D.C. (Hispanic Ex. 30, pp. 207–209, 212–214; Tr. 2309).

(b) Combined Community Communications, Inc. operates a Spanish language service delivered over-the-air on the subcarrier FM multiplex facilities of WOOK(FM) and can be received only by subscribers who pay for a special receiver (United Ex. 78, p. 3; Ex. 88, p. 1).

### *The Spanish Language Radio Programming Proposed by Station WMDO, Wheaton, Maryland*

88. On July 6, 1981 an application was filed for permission to assign the license of daytime only AM radio station WDON, Wheaton, Maryland, to Maryland Lotus Corporation. Maryland Lotus Corporation represented that all its programming would be broadcast in the Spanish language. Included would be five minutes of local, national, and regional news, each hour, seven days a week. Also proposed were two public service announcements each hour for local service, charitable and public spirited groups. The application proposed the broadcast of public affairs programs each Sunday morning from sign-on until 9:00 a.m. and three times per day "during prime listening hours" Monday through Friday (United Ex. 85, p. 1). On September 24, 1981 the Commission granted its consent to the assignment. The new licensee has changed its call sign to WMDO and has indicated that it will broadcast a Spanish-language entertainment and information format designed for all Spanish-speaking persons, including Blacks (United/District Joint Ex. 2, pp. 2–3).

89. WMDO is authorized to use 1 kW of power between sunrise and two hours thereafter and between two hours before sunset and

[18] This station also broadcasts some English language programming designed to serve the Hispanic audience. It has a correspondent in Mexico who files reports from Latin America broadcast in the station's news programs at least three times per week (Tr. 2669). The station has broadcast public affairs programs dealing with subjects of interest to Hispanics (Tr. 2670).

sunset and 5 kW at other times. During those hours in which the station operates with 5 kW of power, it provides a primary signal to 96.4% of the District of Columbia, an unstated but lesser portion of Arlington County, Virginia, and substantial portions of Montgomery and Prince George's Counties, Maryland. When the station operates with 1 kW of power, it provides primary service to 61% of the District of Columbia, no portion of Virginia, and a reduced area of Montgomery and Prince George's Counties, Maryland (United/District Joint Ex. 1, pp. 1–2).

*Hispanic's Proposal to Serve the Washington Area Hispanic Community*

90. Hispanic proposes to operate its station from 5:00 a.m. to 2:30 a.m. Monday through Saturday and from 6:00 a.m. to 1:00 a.m. on Sundays for a total of 148 hours per week (Hispanic Ex. 13, App. A, p. 1). Hispanic's station will provide primary service to the areas and populations in the following table:

| *County or City* | *Total Population Served* | *Persons of Spanish Origin Served* |
|---|---|---|
| Arlington, Va. | 152,599 | 8,863 |
| Fairfax, Va. | 596,901 | 19,535 |
| Fairfax City, Va. | 191,390 | 379 |
| Alexandria City, Va. | 103,217 | 4,042 |
| Falls Church City, Va. | 9,515 | 315 |
| Loudoun, Va. | 22,328 | 168 |
| Fauquier, Va. | 3,909 | 28 |
| Prince William, Va. | 137,467 | 3,108 |
| Washington, D.C. | 637,651 | 17,652 |
| Montgomery, Md. | 571,053 | 22,737 |
| Prince George's, Md. | 664,023 | 14,416 |
| Howard, Md. | 34,433 | 588 |
| Anne Arundel, Md. | 31,543 | 603 |
| Charles, Md. | 51,756 | 998 |
| Totals | 3,035,785 | 93,432 |

91. The specific programs Hispanic will broadcast are (Hispanic Ex. 13, App. A, pp. 2–6):[19]

> *News* — Five-minute newscasts will be broadcast ten times daily Monday - Saturday. At 6:30 a.m. the applicant will broadcast a 30-minute program half of which will be news, an editorial and sports, and half will be devoted to a listing of community events. At 12:00 noon and 6:00 p.m. a 30-minute news and editorial program will be broadcast. At 6:30 p.m. there will be presented a 30-minute program on international news. At 11:00 p.m. the applicant will broadcast a 15-minute summary of the day's events. On Sunday from 11:00 a.m. until 1:00 p.m. the applicant will broadcast a program based upon a Spanish translation of the news and features appearing in the Sunday editions of Washington newspapers.

[19] This programming was developed after taking an ascertainment survey and receiving expert professional advice (Hispanic Ex. 17).

*Public Affairs* — Hispanic will devote $8^1/_2$ hours per week to public affairs including programs on local Hispanic problems, organizations, senior citizens, women, youth, questions raised on an open-line program, and citizenship.

*Instructional* — Hispanic will devote $5^1/_4$ hours per week to English language instruction, including everyday English.

*Cultural* — Hispanic will offer 1 hour per week on local cultural matters, 1 hour on Latin American cultural matters, and a 2-hour concert of classical music by living Hispanic artists.

*Minority Ownership of Broadcast Facilities in the Washington, D.C. Area*

92. Arbitron defines the Washington, D.C. radio market as the District of Columbia, Montgomery, Prince George's, and Charles Counties in Maryland, and Fairfax, Loudon, and Prince William Counties in Virginia (United Ex. 76, pp. 2–3). In an effort to determine the number of stations owned or controlled by minorities in this area, the applicants requested each of the radio and television stations, a transmitter television station and an FM subsidiary communications service in that area to respond to a questionnaire (Hispanic Ex. 30). While all did not respond, those who did provided the information that follows (tabulated in Hispanic's proposed findings at pp. 126–129).

93. None of the five commercial television stations licensed to the Washington area is controlled by minorities. Of the three noncommercial stations licensed to the area one is controlled by Blacks and another has both Blacks (15%) and Hispanics (2%) represented on its governing board (Hispanic Ex. 30).

94. Of the 13 commercial radio stations licensed to Washington, D.C., WYCB, a full-time AM station, is 72.88% Black owned (*id.*, p. 40); WHUR, a commercial FM station licensed to Howard University, has a governing board 70% of which is Black (*id.*, p. 17); station WOL, a full-time AM station, is 100% Black owned (*id.*, p. 75). WGAY(FM) is 50% Hispanic owned (*id.*, pp. 199–205). Three of the stations indicated that they did not know whether 10% or more of their licensee corporations were owned by Blacks or Hispanics (*id.*, pp. 60, 65, 99). All of the remaining stations indicated that 10% or more of their stock was not owned by Blacks or Hispanics.

95. Of the four noncommercial radio stations licensed to Washington, D.C., WDCU, licensed to the University of the District of Columbia, was not in operation and did not respond to the Questionnaire (*id.*, p. 4). WPFW-FM is 16% Black controlled (*id.*, p. 70); WETA-FM is 15% Black, 2% Hispanic controlled (*id.*, pp. 94, 24); WAMU-FM, licensed to American University, indicated that 10% or more of its governing board was not comprised of Blacks or Hispanics (id., p. 104).

96. Blacks do not own 10% or more of the stock of any of the radio stations licensed to communities in the Maryland or Virginia

suburbs of Washington, nor do Blacks represent more than 10% of the board of directors of any such station. Station WGAY(AM), Silver Spring, Maryland, is 50% owned by a Hispanic (*id.*, pp. 199–200, 204).

## *Conclusions of Law*

### *United's Past Broadcast Record*

97. United's license for the station now known as WOOK(FM) has not been renewed since 1966. It filed applications in 1969, 1972, 1975, and 1978 which were not considered in any designation order by the Commission prior to the order released September 30, 1980 (81 FCC 2d 227). That order refers to the "above captioned application of United . . . for renewal of its license." Neither the caption of the referenced application nor the balance of the designation order describes any specific application. United is of the view that the only license period relevant to this proceeding is that for the latest renewal period, 1975–1978. That view has been rejected in this proceeding (Tr. 467–476) and a similar view expressed by an United subsidiary in a related proceeding has lately been rejected by the Review Board (*Intercontinental Radio, Inc.*, 90 FCC 2d 935). Because of its position and because of its alleged difficulties in locating evidence relating to programming in earlier periods, United offered no direct case respecting its pre-1975 broadcast record (United proposed findings, para. 55). As a result, evidence of United's performance during the time it was a Hispanic-oriented station is meager. District offered the renewal applications filed in 1969, 1972, and 1975 and some oral testimony relating to these periods; there is some information which was developed on cross-examination of United witnesses as well as those for Hispanic.

98. The composite weeks shown in the 1969, 1972, and 1975 renewal applications indicate that the percentage of time devoted to news during those periods was 8.2%, 7.48%, and 16%, respectively. There is nothing specific in the record to which these percentages may be compared but United did offer some Arbitron information (United Ex. 76) derived from 1978 applications. This includes percentages of time devoted to news in the Washington Metropolitan Area by 35 radio stations during the 1975–1978 composite years. Measured against those percentages, United's station would rank 11th for the 1969 composite year, 15th for the 1972 composite year, and 4th for the 1975 composite year. This is a good showing but it is diminished because during this period the station had almost no news staff and broadcast little local news.

99. The same comparison may be made with respect to all nonentertainment programming. The composite week shown in the 1969 application would have placed United 3rd from the bottom of the 35 stations for which information was available, the 1972

composite week would have placed United 7th from the bottom, and the 1975 composite week would put United in a tie for last place.

100. A number of the witnesses for Hispanic were themselves Hispanic and were knowledgeable about the Hispanic community. They testified that during the time that the station was broadcasting with a Hispanic format they listened to the station; that most of the Hispanics in the area looked to the station for entertainment, news and information; that at sometime during the 1967–1968 period there was a weekly 15-minute Hispanic news program; and that the loss of this Spanish-language programming was a considerable loss to the Washington area Hispanic community.

101. As indicated above, United's direct case focused on the period following the changeover in 1976 to a Black format. At sometime following the format change and prior to mid-1978, the news capability for the station was dramatically improved. There were then three full-time persons on the news staff including one who worked in the field daily covering local events. The Arbitron comparisons which appear in United's Exhibit 76, indicate that the 1978 renewal application composite weeks put WOOK(FM) in 10th place among metro area stations with respect to the percentage of time devoted to news and in 16th place in percentage of broadcast time devoted to nonentertainment programming. The April 1978 program audit done by United put WOOK(FM) in 7th place among area broadcasters in percentage of time devoted to news and in 12th place in percentage of time devoted to overall nonentertainment programming.

102. United also showed some community involvement, mostly in the 1977–1978 period, and provided information from a large group of community witnesses with backgrounds in community service which indicated that WOOK(FM) with its present format reaches a large number of the Black community with valuable news and information services.

103. An issue in this case requires consideration of the effect of the Commission's failure to renew United licenses for WOOK(AM) and WFAB on its qualifications to retain the WOOK(FM) license. The basic and comparative significance of those matters will be discussed subsequently, but it is noted in connection with the evidence regarding the WOOK(FM) past record that the designation order respecting the WOOK(AM) license was released June 13, 1969 (*United Television Co., Inc.*, 18 FCC 2d 363) and the designation order respecting WFAB was released January 2, 1973 (38 FCC 2d 956); the Commission decision denying renewal of the WOOK(AM) license was released on September 12, 1975 and the Commission decision denying renewal for the WFAB license was released on September 30 of the same year. Evidence respecting licensee improvements taking place after the filing of a competing application has been

traditionally deemed valueless as showing only the reaction of a station to the fear of the nonrenewal of its license. See, for example, *RKO General, Inc.*, 35 FCC 2d 100. Under that theory the evidence with respect to United broadcast practices after the WOOK(AM) and WFAB decisions must be accorded only diminished weight.

*Matters Relating to the WOOK(AM) and WFAB Renewals, Notice of Apparent Liability, and Matters in Mitigation*

104. Since collateral estoppel rules bar relitigation of questions raised in the WOOK(AM) and WFAB matters, the principal questions remaining relate to material offered in mitigation and the death of Richard Eaton.

105. District argues (proposed findings p. 71) that improvements made after an alleged violation has been designated may not be considered in mitigation, citing *The Trustees of the University of Pennsylvania*, 69 FCC 2d 1394. United argues that the rule should not apply to a multiple owner because conduct found to be disqualifying at one station would automatically disqualify all other commonly owned stations, a course obviously not followed by the Commission. United's position does not necessarily follow, but in this multiple license situation, matters done to mitigate wrongdoing at another station will be considered relevant to the question of the renewability of the WOOK(FM) license because the wrongdoing at other stations [WOOK(AM) and WFAB] must, under the Commission's direction, be considered here. The question then becomes one of the weight to be given the evidence offered in mitigation. One matter offered in mitigation was that in 1973 United switched to a procedure whereby all bills for advertising are submitted by a central office and are based on station logs showing advertising that actually ran. This change followed designation by the Commission of the WFAB renewal on charges of double billing. Similarly, United's practice of checking its stations for technical compliance came after sharp criticism of its technical performance in WOOK(AM). While it cannot be said that every improvement by United with respect to control of its stations was begun as a result of a specific Commission criticism, it is true that most of United's concern with its local operations did not come until after scathing criticism of its indifference to or inability to control its stations. The mitigating effort, principally in the late 1970s, came only when United knew its licenses were in jeopardy.

106. The rule violations considered with respect to the Notice of Apparent Liability are principally significant in that they indicate a continuing failure by United to clean up its operations as late as 1977 and early 1978. These violations militate against the mitigating

effect of the United effort to improve which had begun at least a year earlier.[20]

107. The Commission's *Memorandum Opinion and Order* released April 30, 1981 (86 FCC 2d 452), which added the WOOK(AM) and WFAB issue, anticipated that there might be an involuntary transfer of control caused by Mr. Eaton's illness. If so, the order said, there would still be "a serious question . . . about the soundness and reliability of the licensee's operations, and thus, about United's basic qualifications." That order was written before Mr. Eaton died; the question posed remains.

108. United argues that "to the extent that [WOOK(AM) and WFAB] incidents reflect poorly on United's operations, it must be emphasized both that the incidents occurred during the time when United was absolutely controlled by Richard Eaton, and that the Commission itself attributed the incidents, directly or indirectly, to him. Richard Eaton is dead, and control of United has passed to a new and different generation of broadcasters. Richard Eaton represented the old United, the United founded and controlled by the efforts of a single broadcast pioneer. In the years since the WOOK(AM) and WFAB(AM) misconduct, a new United has gradually developed as Richard Eaton's health forced him to delegate some of his responsibilities. The new United has adopted stringent operating procedures to prevent the mistakes of the past from recurring and to guard against any mistakes in the future" (United proposed findings, p. 246). United has also argued: "A final point needs to be emphasized here. DBC [District] seeks to de-emphasize the importance of the death of Richard Eaton [citations omitted]. In doing so, DBC blinds itself to the fact that Richard Eaton was the only common thread connecting the WOOK(AM) and WFAB(AM) proceedings. He was, after all, United." It says further, "the fact that he died after this proceeding was underway does not relieve the Commission of the responsibility of assessing the full impact of his death on United's qualifications. That impact must be significant, since it removes the last vestigial connection between the old United which lost WOOK(AM) and WFAB(AM), and the new United, which has enjoyed a virtually unblemished record at WOOK(FM) for ten years" (United reply findings, pp. 25–26).

109. As pointed out by the Bureau and District (and by United in para. 7 of its reply findings), there are connections between the "new" United and United as it existed at the time of the WFAB and WOOK(AM) offenses. Pierre Eaton was a director of the WFAB licensee and is now a director of United. E. Carlton Myers, Jr. was the station general manager of WOOK(AM) and is now a vice president of United as well as general manager of station

[20] These violations are not disqualifying conduct—considered alone or as part of all relevant information.

WOOK(FM). Clifton D. Holland was a program director and vice president of WOOK(AM); he is currently a vice president of United and public affairs director of WOOK(FM). Gerald J. Hroblak was assistant controller of United prior to 1972 and in that year became controller; he is now chairman, president, and treasurer of United and actively takes part in WOOK(FM) management.

110. United did not offer evidence that Richard Eaton was the sole decision maker with respect to the stations and was therefore responsible for the WFAB, WOOK(AM), and WOOK(FM) problems. This may have been because the hearing began March 16, 1981, before Mr. Eaton's death on June 1, 1981. In any event United cannot now rely on what might have been the fact but which it did not prove.

111. Notwithstanding all that, Richard Eaton was the sole stockholder, president, chairman of the board, and active in the management of United during his lifetime. Those factors, together with the implications of the Commission's *Memorandum Opinion and Order* in *Friendly Broadcasting Company*, released June 17, 1982 (90 FCC 2d 225)[21] preclude a holding that where the sole stockholder of a multiple licensee dies, disqualifying conduct during his lifetime at one station disqualifies the company as licensee at another station. The effect of the death of Mr. Eaton on the comparative aspects of this case is another matter.

*United's Comparative Case*

112. The Commission's policy with respect to the post designation death of a sole owner is different in the comparative process than it is in the qualifying process. Traditionally, the death of a sole owner and the resulting involuntary transfer of his stock may not be used to change the comparative situation that existed prior to designation. See *Rose Broadcasting Company*, 68 FCC 2d 1242; *Mid-Florida Television Corporation*, 69 FCC 2d 607. Thus the death of Richard Eaton may not be used to upgrade United's comparative case.

113. In *Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), the

[21] Friendly, an United subsidiary wholly owned by Richard Eaton at his death, was licensee of two stations in Cleveland. In a noncomparative proceeding the stations' renewal licenses had been denied by an ALJ because of disqualifying conduct at one of the stations and at WFAB (FCC 77D-7). After Eaton died, the Commission terminated the proceeding without consideration of the qualifying matters. "Commission policy has been to afford relief to a licensee in a renewal proceeding after the death of the licensee's principal, even where the deceased was implicated in prior misconduct at the station, provided that there is no evidence indicating that the misconduct is likely to recur. The death of the sole proprietor of a station obviates the administrative need for an evidentiary hearing. Where there is no evidence that the improper practices would recur under the new management, the Commission will terminate a proceeding and allow the decedent's interest to pass to his estate [citation omitted]."

Commission indicated that a comparative renewal process must consider that an existing licensee is entitled to a comparative preference if its past record was substantial or better but is entitled to no preference if its past record was minimal. It is clear that past records are to be weighed in the general comparative process. See *Central Florida Enterprises, Inc.* v. *F.C.C.*, 683 F.2d 503 (1982).

114. With respect to its past record, United is entitled to a plus for the amount of time devoted to news during the years it was a Spanish-language station. It is entitled to a plus for the service that the Hispanic witnesses testified it gave to the Hispanic community. Against those two pluses is weighed a minus for the poor record that the station had for local news coverage and a minus for its poor showing in regard to the amount of time it devoted to nonentertainment programming other than news. For the years during which United was a Spanish-language station, on balance, its performance was minimal. United's performance after it adopted a Black format would be considered substantial if that performance had come at a time before United had fears for its licenses. The credit given United for those years is therefore diminished. United reaps a substantial demerit for its unwillingness or inability to control local stations WFAB and WOOK(AM). Matters shown in mitigation are somewhat discounted by their motivation. The forfeiture matter regarding WOOK(FM) is a negative but of minor significance. The total record is no better than minimal.

115. With respect to diversification, United must be given a demerit for its interest in other broadcast stations, particularly those in Rockville and Baltimore, Maryland. United claims no integration credit and on the basis of the record is entitled to none.

*Hispanic's Reporting Issue*

116. There is no question that Mr. Casillas' conviction was not reported and that it should have been. United and District would expand this failure by Hispanic's principals into a general inquiry into whether Hispanic kept control of its application though there is no such issue. The only matter to be decided is the specific failure mentioned. The Hispanic principals left the checking of personal histories to the Hispanic attorney. The mis-reporting was a result of an out-of-date reporting form and some advice by the personal attorney of the principal involved respecting the classification of the crime to which Casillas pled guilty. The Hispanic principals were derelict in their duty to supervise in only a very minor way and that minor failing is decisionally insignificant.

*Hispanic Programming Proposal*

117. Hispanic has expanded its argument that its programming proposal entitles it to a comparative preference into the following claim: "The combination of minority ownership, Spanish language

programming and overwhelming need for that programming demonstrated by the record in this proceeding requires a grant of its application without the necessity of a full comparison under the traditional comparative criteria." (See Hispanic reply findings para. 38.) Hispanic claims credit as a minority owned applicant notwithstanding the fact that District is also minority owned because there are several Black owned broadcast stations in the area but few Hispanic owned stations. The Commission has recognized minority ownership in the comparative process through the integration of ownership and management criteria and has not granted separate preferences for minority ownership standing alone (*WPIX, Inc.*, 68 FCC 2d 381, 411).

118. Events have overtaken Hispanic's programming proposal. At the time the inquiry was authorized, there was no station in the metropolitan area which specialized in Spanish-language programming and it was questionable whether the programming that then existed was "meaningful" as that term has been used in the recent cases. Two cases, *Flint Family Radio, Inc.*, 69 FCC 2d 38, and *George E. Cameron Jr. Communications*, 71 FCC 2d 460, have defined a new approach to specialized programming purposes. In *Flint* the Review Board refused to grant a preference as between proposed religious and proposed Black programming. "This is not to say that a preference in this area can never be earned, but rather that unless an applicant proposing a specialized program format can first establish that the type of programming it proposes (*e.g.*, Black-oriented, religious, foreign language, etc.) is not already available from existing stations in any meaningful amount, we see no satisfactory objective means of accessing the need for additional amounts of programming and making a comparison between competing claims of greater need. Our refusal to accord either [applicant] a preference for its specialized programming format is not a marked departure from the results reached in earlier decisions. In *La Fiesta Broadcasting Co.*, 6 FCC 2d 65, 9 RR 2d 295 (Rev. Bd. 1966), the significant preference granted to the applicant proposing Spanish language programming was based upon the absence of any locally originated Spanish language programming."

119. WMDO has begun broadcasting from Wheaton in the Spanish language from sunrise to sunset. During the first two hours after sunrise and the last two hours before sunset it is limited to 1 kW of power and may broadcast with 5 kW of power at other times. During the times it can broadcast at 5 kW it provides a primary signal to almost all of the District, parts of Arlington County, Virginia, and substantial portions of Montgomery and Prince George's Counties, Maryland. When the station operates at 1 kW it provides primary service to 61% of the District, none to Virginia, and to a lesser portion of Montgomery and Prince George's Counties. The broadcasting includes Spanish-language entertainment and

local, regional, and national news. It also provides for public affairs programming during the early hours on Sunday and three times a day during prime hours Monday through Friday. Whatever the situation with respect to the Spanish-language broadcasting now provided by other stations, it must be concluded that under the *Flint Family Radio* test, there is meaningful Spanish-language broadcasting in the area and that Hispanic is entitled to no programming preference.

120. With respect to diversification, the husband of Raquel Marquez Frankel owned an interest in a corporation which had a construction permit for a television station in Delaware. That interest is decisionally insignificant. No other Hispanic principal has any interest in any medium of mass communications.

121. Hispanic makes no claim for integration credit; its proposal includes only minimum participation by its principals. Since none of the participation approaches 20 hours per week, under the *Midwest Broadcasting Company,*; 70 FCC 2d 1489, test, it can be given no quantitative integration credit.

*District Broadcasting*

122. There are no special issues directed specifically to District. While it proposes to broadcast a Black format it has claimed no credit for its proposed programming. Neither District nor any of its principals have any interest in any medium of mass communications. All of District's principals are Black and each will own 25% of District. All except Herman F. Stamps propose to devote four hours a week to District programming board and so are entitled to no quantitative integration credit though the District proposal is enhanced in a minor way by reason of their participation and the fact that each is Black.

123. It is proposed that Herman F. Stamps will devote 40 hours a week as the station's full-time managing director; he is to be the executive in charge of broad management and company planning under the direction of the board of directors. The question of credit to be given for Stamps' participation is the only one needing resolution with regard to the District proposal.

124. United (and Hispanic by adoption) argues that the Stamps integration proposal should not be considered because it came late, because Stamps' track record as an administrator at Howard is marred as well as overstated, and because District and Stamps are insincere in the proposal.

125. Stamps' participation as managing director was contained in a District amendment filed March 14, 1979. The designation order was released September 30, 1980. District had a right to amend the application at the time it did and to upgrade its comparative proposal under the rules. See *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 431.

126. United argued in effect that the OSHA violations charged against Howard University at the time that Stamps coordinated OSHA compliance indicate that his attitude toward regulation is questionable and that his willingness to claim responsibility in his role at Howard while disclaiming responsibility for specific violations, manifests insincerity. There is no issue with respect to OSHA violations and the record is skimpy as to what happened. There is not enough shown to prove a cavalier attitude toward regulation in general. The double attitude charged to Stamps by United reveals nothing more than a commonly observed tendency of most humans to emphasize their strengths and minimize their weaknesses. This obviously can be done to a fault but that is not the case here.

127. On the facts shown, it cannot be concluded that Stamps will not work full time at specified management duties if District's application is granted. The fact that he has no experience in the broadcast field does not lessen the integration credit which attaches to full-time employment by an owner [*Webster-Baker Broadcasting Company*, 88 FCC 2d 944 (Rev. Bd. 1981)].

128. United argues that it is unfair to deny it the opportunity to show as part of its broadcast record events which occurred after competing applications were filed while allowing District to amend its application to improve its comparative posture. Any renewal applicant is as free as any nonrenewal applicant to amend its proposal at any appropriate time in order to improve any aspect of its comparative showing except past broadcast record. Had Hispanic or District been licensees at other stations, their past broadcast records would have been examined under the same conditions as was United's.

129. District has no demerit for diversification and is entitled to 25% integration credit for participation by Dr. Stamps. It has a minor preference for its standby generator.

*Ultimate Conclusions*

130. It is concluded that United is basically qualified to be granted a renewal of its license for WOOK(FM). United is comparatively less qualified than either Hispanic or District because of its minimal past broadcast record, its lack of integration credit, and its relatively inferior position respecting diversification. Hispanic and District rank equally respecting diversification but District has a 25% integration credit and Hispanic has no integration credit. District has a minor credtit for its proposed emergency power supply and Hispanic is entitled to no preference for its programming proposal. Of the three applicants, District is, from a comparative point of view, best qualified.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276

of the rules, the application of United Broadcasting Company, Inc., for renewal of its license to operate an FM station on channel 262, Washington, D.C., IS DENIED; the application of Hispanic Broadcasting Corporation for a construction permit for a new FM station to operate on channel 262, Washington, D.C., IS DENIED; and the application of District Broadcasting Company for a construction permit for a new FM station to operate on channel 262, Washington, D.C., IS GRANTED.[22]

FEDERAL COMMUNICATIONS COMMISSION
FREDERIC J. COUFAL, *Administrative Law Judge*

[22] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Agreement, Between Applicants
Grant, Conditional
Pleading Dismissal of
Settlement

Review Board granted joint request for approval of agreement calling for grant of one application and dismissal of competing applications. Unauthorized pleading seeking condition on grant dismissed. Board on its own motion, however, added condition to the award of the construction permit.
–*Whitco Broadcasters, Inc.*
BC Docket No. 81–733

FCC 83R–50

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| WHITCO BROADCASTS, INC.<br>Hollywood, Florida | BC Docket No. 81–733<br>File No. BPCT-800815KG |
| FAMILY TELEVISION 69, INC.<br>Hollywood, Florida | BC Docket No. 81–734<br>File No. BPCT-801121KH |
| GOLDEN EAST BROADCASTERS, INC.<br>Hollywood, Florida | BC Docket No. 81–735<br>File No. BPCT-801121KI |
| CHRISTIAN MEDIA OF FLORIDA, INC.<br>Hollywood, Florida | BC Docket No. 81–736<br>File No. BPCT-801121KJ |
| For Construction Permit | |

MEMORANDUM OPINION AND ORDER

(Adopted: July 12, 1983; Released: July 15, 1983)

BY THE REVIEW BOARD: BOARD MEMBER JACOBS ABSENT.

1. On July 5, as supplemented on July 11, 1983, the applicants in this case filed a joint request for approval of agreement proposing

the grant of the Whitco application for a new UHF construction permit in Hollywood, Florida, and the dismissal of the other applications. We will grant the joint request because it complies with the new requirements of the Communications Act and the Commission's Rules.

2. In an Initial Decision, FCC 83D-24, released April 12, 1983 (I.D.), Administrative Law Judge Conlin granted Whitco Broadcaster's application because 100% of its ownership would participate full time in the operation of the station and because "it is entirely minority owned," citing *Waters Broadcasting Corp.*, 91 FCC 2d 1260, 52 RR 2d 1063 (1982). I.D., para. 56. The parties have not filed exceptions; instead they have entered into an agreement and made the showing required by Section 311(c)(3)(a) and (b) of the Communications Act. *See Berkshire Television, Inc.*, FCC 83R-30, released Arpil 21, 1983, and cases cited therein.

3. Affidavits have been submitted by the parties showing that the dismissing applications were filed in good faith to obtain a grant and not to harass any other applicants and coerce a payment contrary to the requirements of new Section 311(c)(3)(b). They have also shown that the public and private interests would be served by approval of the agreement because it would conserve the resources of the Commission and the parties, and would expedite the institution of new service. *See* Section 311(c)(3)(a).

4. On May 12, 1983, the National Association of Business and Educational Radio, Inc. (NABER) filed comments requesting that a grant in this case be made subject to a specific condition that broadcast operation will comply with Section 73.687(i)(1) of the Commission's Rules. Thereafter, on May 27, 1983, the Mass Media Bureau filed a motion to dismiss NABER's comments on the grounds that only parties to a proceeding are permitted to file pleadings after an Initial Decision.

5. We agree with the parties that NABER's comments are unauthorized under our Rules. *See* Section 1.276(a). They will therefore be dismissed. Nonetheless, the Review Board has previously held, following Commission precedent, that such a condition is appropriate; we will, therefore, *sua sponte*, add a condition to the award of the construction permit. *See Washington's Christian Television Outreach, Inc.*, FCC 83R-23, released March 28, 1983.

6. ACCORDINGLY, IT IS ORDERED, That the motion to dismiss comments of the National Association of Business and Educational Radio, Inc., filed by the Mass Media Bureau on May 27, 1983 IS GRANTED to the extent indicated above; and that the comments filed by the National Association of Business and Educational Radio, Inc., on May 12, 1983 ARE DISMISSED; and

7. IT IS FURTHER ORDERED, That the joint request for approval of agreement filed July 5, and supplemented July 11, 1983, IS GRANTED; that the application of Whitco Broadcasters, Inc., IS

GRANTED; and that the applications of Family Television 69, Inc.; Golden East Broadcasters, Inc., and Christian Media of Florida, Inc., ARE DISMISSED; and that this proceeding IS TERMINATED; and

8. IT IS FURTHER ORDERED, That grant of the construction permit is conditioned on the permittee taking adequate measures to provide interference protection to land mobile services in the 460–470 MHz band *prior to program test authorization.* No automatic equipment or program test authority will be permitted. Prior to conducting equipment tests, the permittee shall gain Commission approval of its plan to prevent undue interference to land mobile services. The permittee will be required to file a request for program test authority along with the license application, and document that objectional interference will not be caused to land mobile services as a result of Channel 69 operation.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D–24

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| WHITCO BROADCASTERS, INC.<br>Hollywood, Florida | BC Docket No. 81–733<br>File No. BPCT-800815KG |
| FAMILY TELEVISION 69, INC.<br>Hollywood, Florida | BC Docket No. 81–734<br>File No. BPCT-801121KH |
| GOLDEN EAST BROADCASTERS, INC.<br>Hollywood, Florida | BC Docket No. 81–735<br>File No. BPCT-801121KI |
| CHRISTIAN MEDIA OF FLORIDA, INC.<br>Hollywood, Florida | BC Docket No. 81–736<br>File No. BPCT-801121KJ |
| For Construction Permit | |

*Appearances*

*James J. Freeman* and *Lawrence E. Carr*, on behalf of Whitco Broadcasters, Inc.; *Robert S. Stone*, on behalf of Family Television 69, Inc.; *John B. Jacob* and *Dennis J. Kelly*, on behalf of Golden East Broadcasters, Inc.; *Aaron Shainis* and *Lee Peltzman*, on behalf of Christian Media of Florida, Inc.; and *Y. Paulette Freeman*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOHN H. CONLIN

(Issued March 31, 1983; Released April 12, 1983)

*Preliminary Statement*

1. This proceeding involves four mutually exclusive applications for authority to construct a new commercial television broadcast station on Channel 69, Hollywood, Florida. The Hearing Designation Order released October 23, 1981 specified the following issues:

1. To determine with respect to Whitco Broadcasting [sic], Inc.:

(a) whether applicant has an additional $855,265 available;

(b) whether, in light of the evidence adduced pursuant to (a), applicant is financially qualified.

2. To determine with respect to Golden East Broadcasters, Inc.:

(a) whether, applicant has an additional $342,438 available;

(b) whether, in light of the evidence adduced pursuant to (a), applicant is financially qualified.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. By separate orders (FCC 82M-0059 and FCC 82M-0063) released January 8, 1982, the financial issues specified against Whitco Broadcasters, Inc. and Golden East Broadcasters, Inc. were resolved in favor of the applicants. Consequently, the hearing proceeded solely on the comparative issue. A prehearing conference was held on January 6, 1982 and the hearing was held on April 20–22, 1982. Proposed findings and conclusions were filed on August 9, 1982 and replies were submitted on August 30.

## *Findings of Fact*

### *Whitco Broadcasters, Inc. (Whitco)*

3. Whitco is a stock corporation organized under the laws of the State of Delaware and qualified to do business in the State of Florida. All of the stock is owned by two individuals: Thomas J. Coates and Eddie L. Whitehead, each of whom holds a 50% interest. Neither Coates nor Whitehead has any ownership interests in any medium of communications. Both men are black.

4. Each owns 50% of J-Pax Broadcasters, Inc. which has filed applications for TV translator stations in a number of cities throughout the country. All of these applications were subject to the low power freeze and at the time of the hearing had not been accepted for filing. The same is true of several other similar applications in which Whitehead but not Coates has an interest.

5. Coates is the president of Whitco and will serve as full-time (a minimum of 40 hours per week) general manager of the proposed station. His job will encompass all of the responsibilities normally associated with the position of general manager, including general responsibility for day-to-day programming decisions, establishment and supervision of personnel and general office practices, and coordination and supervision of all subordinate sections.

6. Coates currently is self-employed as president and 51% owner of Coates Construction and Development, Inc., an investment venture emphasizing investments in the construction field (Tr. 45–46). He also serves as a consultant to a Chicago bank. He is primarily involved in monitoring existing investments and seeking new

opportunities. The only project with which the company is now actively involved is in Louisville, Kentucky (Whitco Ex. 1). Coates intends to maintain control over the Louisville project by telephone and he estimates that maintaining his interest in Coates Construction will require a maximum of approximately 12 to 15 hours per week (Whitco Ex. 1; Tr. 71). Coates presently lives in Chicago but intends, in the event of a grant, to move to Hollywood and give priority to his managerial duties at the proposed station (Whitco Ex. 1; Tr. 53, 90–91).

7. Whitehead is vice president of Whitco and will become the station's full-time (40 hours per week) sales manager. He will be responsible for the operation of the sales staff generally, and he will be specifically responsible for the supervision and maintenance of the station's accounts, establishing rate schedules and directing sales research (Whitco Ex. 2).

8. Whitehead is self-employed as an investor, most of his investments being in real estate on the west coast where he now lives (Tr. 122–124). Whitehead will move to the Hollywood area if the application is granted and proposes to employ managers to oversee his properties in the west. He expects to spend about 15 hours per week monitoring those investments (Whitco Ex. 2).

*Family Television 69, Inc. (Family)*

9. Family is a Florida corporation currently comprised of eight stock subscribers, who are subscribers to the following shares of stock and who hold the following positions in the corporation:

| *Stock Subscriber* | *No. of Shares* | *% of Shares* | *Office* |
|---|---|---|---|
| Adib Eden, Sr. | 500 (950) | 14.28 (27.13) | President, Director |
| Adib Eden, Jr. | 0 (100) | 0.00 (2.85) | Vice President, Director |
| Juan Sixto | 500 | 14.28 | None |
| Vicente Vadillo | 150 | 4.28 | None |
| Jose Concepcion | 100 | 2.85 | None |
| Interamerican Community Church, Inc. | 800 | 22.85 | None |
| Jose Luis Soto | 500 | 14.28 | None |
| Rafael Pena | 400 | 11.42 | None |

As of the Commission's "B" cut-off, Adib Eden, Sr. had a 14.28% interest in Family and Adib Eden, Jr. had a 0% interest. The parenthetical figures referenced above reflect the actual current

agreement among the subscribers of Family. Interamerican Community Church, Inc. is a nonprofit, nonstock corporation, comprised of five officers and directors, including Adib Eden, Sr. and Adib Eden, Jr.

10. Neither Family nor any of its officers, directors, subscribers, or officers or directors of its corporate subscriber have any ownership interest in any existing outlet of mass communications.

11. Of the above individuals, Adib Eden, Sr. will serve as general manager of the proposed Hollywood television station and will devote a minimum of 20 hours per week to this position. Adib Eden, Jr. will serve as operations manager and will devote a minimum of 40 hours per week to this position. Vicente Vadillo will serve as sales manager of the facility and will devote a minimum of 40 hours per week to this position. In addition, the board of directors will participate in the formulation of program policies for the applicant, meeting on a regular basis and devoting about 10 hours per week to the operations of the facility.

12. Adib Eden, Sr. resides in Hialeah, Florida. As general manager of the station proposed by Family, he would oversee and supervise all operations of the station. Eden is now pastor of La Catedral Del Pueblo Church, a position he will continue to hold if the application is granted. He is also president of Adib Eden Evangelistic-Missionary Society, a nonprofit corporation organized for the purpose of the ministry; senior minister of Interamerican Community Church of Hialeah; and head of the Childhood Development Center in Miami, a center established for child care.

13. Eden has considerable broadcast-related experience. He has produced television programming which is presented regularly over WKID(TV), Fort Lauderdale, including La Catedral Del Pueblo, a one-hour religious program that appears over WKID(TV) on Sunday afternoons from 3:00 p.m. until 4:00 p.m. In addition, Eden is responsible for the production of the program "Realidades" which appears over WQBA, Miami, Florida, on Sunday mornings from 8:00 a.m. until 8:30 a.m. He also serves as moderator for this program which has been broadcast for the last four years.

14. In the past he has produced such programs as "Voces de Inspiracion," "El Camino Infinito" and "La Catedral Del Pueblo." All of these programs are religious in nature and have appeared regularly over stations in the Miami area.

15. For purposes of resolution of the comparative issue in the instant proceeding, Adib Eden, Jr. serves as vice president of Family's proposed station. He will serve as operations manager of Family's proposed station, devoting a minimum of 40 hours per week to the discharge of his duties as such operations manager (Family Ex. 3). His cognizable ownership interest in Family is derivative, stemming from his interest in Interamerican Community Church, Inc., one of Family's stock subscribers. Eden, as one of five directors

for this nonstock corporation, will be credited with a 4.5% interest in Family.

16. Eden is now director of productions of Semae Productions where he personally directs and/or produces television programs to be aired over WKID(TV), Fort Lauderdale, Florida, as well as several special programs annually for presentation in foreign countries throughout the Caribbean area. Semae Productions is also engaged in the production of commercials and other promotional announcements. He has engaged in this endeavor since 1974.

17. Vicente Vadillo, subscriber to 4.28% of Family's stock, will serve as sales manager of Family's proposed station should Family be awarded a construction permit. A Miami resident, Vadillo will devote a minimum of 40 hours per week at the station in discharging his duties as sales manager. Vadillo is now a public accountant and operates an accounting firm with his son. If Family is awarded a construction permit, he will discontinue working at the accounting firm in order to work full time at the television facility.

*Golden East Broadcasters, Inc. (Golden East)*

18. Golden East was chartered by the State of Florida on September 3, 1980. The corporation is authorized to issue 1,000 shares of common stock; each share has one vote and a par value of $1.00. Fourteen shares of Golden East's common stock have been issued and are outstanding.

19. The following individuals are principals of Golden East and own shares to the extent indicated:

| *Stock Owner* | *Office* | *No. of Shares* | *% of Shares* |
|---|---|---|---|
| Howard L. Green<br>Northfield, New Jersey | President,<br>Director | 2 | 14.285 |
| Simon Goldman<br>Lakewood, New York | Vice President,<br>Director | 1 | 7.143 |
| Marilyn Goldman<br>Lakewood, New York | None | 1 | 7.143 |
| Joseph J. Jackler<br>Fayetteville, New York | Treasurer,<br>Director | 2 | 14.285 |
| Michael C. Steele<br>Elmira, New York | Secretary,<br>Director | 2 | 14.285 |
| Alfred C. Cordon<br>Gaithersburg, Maryland | Vice President,<br>Director | 2 | 14.285 |
| John B. Jacob<br>Alexandria, Virginia | Vice President,<br>Director | 2 | 14.285 |
| Donald M. Simmons<br>Sayre, Pennsylvania | Vice President | 2 | 14.285 |

20. Howard L. Green is a career broadcaster, having been involved in the industry since 1949, and having been involved in the ownership and management of broadcast stations since 1957. He currently is officer, director and 50% stockholder of the licensees of WENY(AM), WLEZ(FM) and WENY-TV, Elmira, New York; WOND(AM), Pleasantville, New Jersey; WMGM-FM, Atlantic City, New Jersey; and officer, director and 25% stockholder of the licensee of WAAT(TV), Wildwood, New Jersey. The licensee of WENY-TV is also permittee of television translator stations at Hornell and Ithaca, New York.

21. Simon Goldman has managed broadcast stations since 1936, and has owned them since 1955. He is officer, director and 80% stockholder of James Broadcasting Company, Inc., licensee of WJTN(AM) and WWSE(FM), Jamestown, New York; 100% owner of the licensee of WLKK(AM) and WLVU(FM), Erie, Pennsylvania; 79% owner of Vermont Radio, Inc., licensee of WVMT(AM), Burlington, Vermont, WSYB(AM) and WRUT-FM, Rutland, Vermont; and permittee of MDS station WFY-943, Rutland, Vermont.

22. Marilyn Goldman is the wife of Simon Goldman and is 0.76% stockholder in James Broadcasting Company, Inc.

23. Joseph J. Jackler is an accountant in Syracuse, New York. He is an officer and director of the licensee of stations WOND(AM), Pleasantville, New Jersey, and WMGM-FM, Atlantic City, New Jersey.

24. Alfred C. Cordon, Gaithersburg, Maryland, is a communications attorney, having continuously practiced in the field since 1952.

25. John B. Jacob, Alexandria, Virginia, is a communications attorney, having continuously practiced in the field since 1952.

26. Michael C. Steele is a career broadcaster and has participated in the management of broadcast stations since 1962. Steele is 6.53% owner of the parent corporation of the licensee of KWEB(AM) and KRCH-FM, Rochester, Minnesota. He is currently general manager of WENY(AM), WLEZ(FM) and WENY-TV, Elmira, New York.

27. Donald M. Simmons, Sayre, Pennsylvania, is a businessman and broadcaster, having participated in the ownership of broadcast stations since 1957. He is currently officer, director and 50% stockholder in the licensees of WENY(AM), WLEZ(FM) and WENY-TV, Elmira, New York, WOND(AM), Pleasantville, New Jersey, and WMGM-FM, Atlantic City, New Jersey. He is also an officer, director and 25% stockholder in the licensee of WAAT-TV, Wildwood, New Jersey, as well as a 25% stockholder of Ocean City Sentinel-Ledger, Inc., publisher of the Ocean City, New Jersey *Sentinel-Ledger*.

28. None of these individuals plans to participate in the day-to-day operation of the station.

*Christian Media of Florida, Inc. (Christian)*

29. Christian is a nonprofit, nonstock corporation organized under the laws of Florida. The business and affairs of the corporation are managed under the direction of its board of directors. Christian has reported the following officers and directors:

| *Name* | *Office* | *Director* |
|---|---|---|
| Arthur L. Shell, Jr. | President | Yes |
| John Alessi | Secretary, Treasurer | Yes |
| Selwyn Scott | None | Yes |
| Rose Marie Pagan | None | Yes |
| Palmira Reyes Lozada | None | Yes |

30. Neither Christian nor any of its officers or directors have any ownership interest in or exercise any control over any medium of mass communications.

31. Reverend Shell will be general manager of the proposed station and has proposed to work full time in this position (Christian Ex. 4). He is presently pastor of Trinity Church, Inc. of Miami, which has more than 500 members, and is a resident of Miami. He is also a member of the Greater Miami Ministerial Association, a member of the board of directors of Teen Challenge of Florida, and a board member of Good Samaritans, Inc. Reverend Shell has indicated that he would continue to be pastor (Tr. 263) and has not indicated any intention to give up his other activities.

32. Reverend Shell's experience in broadcasting includes three years of television ministry on a weekly basis sponsored in Miami by the Trinity Church. In connection with the Greater Miami Ministerial Association, he has been given the assignment of rotating time on Channel 10 and also has been asked to present the daily devotions for Channel 7 in Miami. Since coming to Miami in 1977 he has become a member of the Greater Miami Ministerial Association. He is presently serving as a member of the board of directors of Teen Challenge of Florida, a drug and alcohol rehabilitation program for all races. This organization has established a home for men in Miami and one for women in Avon Park, Florida. He has been active with the Miami Rescue Mission and has assisted pastors of both Black and Spanish churches in securing finances with which to purchase or build churches. He is chairman of the committee working toward the construction of a major church for Spanish people in Little Havana (Dade County, Florida). This committee appointment is from the National Home Missions Board, General Council, Assemblies of God,

Springfield, Missouri headquarters. Both American and Spanish ministers are involved. He is a member of the board of directors of Good Samaritans, Inc., a newly formed nonprofit corporation. Its stated purpose is to furnish financial assistance and supplements to the income of persons and/or families whose primary source of income has been reduced as a result of a catastrophic terminal illness and/or permanent disability.

33. John Alessi will be sales manager of the proposed television station and will serve as Christian's secretary/treasurer. Reverend Alessi proposes to be employed full time at the station (40 hours per week) and described his work as assisting in the responsibilities of day-to-day decisions, supervision and direction of the operation of the station. In 1963 Reverend Alessi founded the "Grace Church of Kendall," where he is presently senior pastor (Christian Ex. 8, p. 3). In addition to his activities as senior pastor, Reverend Alessi is president of Givani Developers, Inc., a Florida corporation apparently involved in real estate and construction (*id.*). His present civic activities include serving as vice president of New Horizon's Ministries, a nonprofit organization dealing with children. He is also a member of the Greater Miami Fellowship of Churches, the Miami Ministerial Association and the National Association of Evangelicals. There is no evidence that Reverend Alessi will discontinue his involvement in these employment and other activities should Christian receive a grant in this proceeding. He is a resident of Miami.

34. Selwyn Scott, a resident of Opa-Locka, Florida,[1] is proposed to be the full-time station manager should Christian's application be granted. In that position he will be responsible for day-to-day decisions, supervision and direction of the operation of the station under the supervision of the general manager. Scott is currently the pastor of the Revival Tabernacle Church Assembly of God in Miami, Florida. This church is located in Miami and ministers primarily to black people of varied socio-economical backgrounds. As pastor he is involved in all areas of people's lives from marital counseling to court appearances. He also holds a license to preach with Peninsular Florida District of the Assemblies of God. In 1979 he obtained a Florida real estate license and is a member of the Hollywood and Miami board of realtors.

35. Rose Pagan, a resident of Miami, Florida, is proposed to be the full-time program director and coordinator of religious affairs at the station. She will be responsible for day-to-day decisions and for the supervision and direction of her department under the general manager. Ms. Pagan has been a resident of Miami since 1979. She is currently employed as a sales person for a surgical supply company.

36. Palmira Lozada, a resident of Miami, Florida, is proposed to

[1] Opa-Locka is in the immediate Hollywood area.

be the full-time director of community and minority affairs and news director of the station. She will be responsible for the supervision and proper presentation of programming involving the needs of the community. She moved to Miami in 1970 and became a school teacher in the Dade County school system. She later became involved in the field of real estate. She is currently employed by Eastern Airlines as a part-time control tower agent. Her status with Eastern is such that she can control her time and be able to put her time and effort toward the advancement of her duties for Christian. She has been for the past 12 years an active member of the Grace Church of Kendall, where she served as the secretary/treasurer for 11 years.

37. Both Ms. Lozada and Ms. Pagan are Hispanics.

*Comparative Analysis*

38. Golden East proposes no participation by its ownership in the day-to-day management of the station and most of its principals have ownership interests in numerous broadcast facilities. None of the other applicants and none of their principals hold any interests in existing media of communications. Family's full-time integration, in the persons of Eden, Jr. and Vadillo, amounts to 8.85%, with substantial part-time participation being provided by Eden, Sr., a 14.28% owner. On the other hand, Whitco and Christian propose full-time integration in station affairs by all of their principals. Clearly, then, the outcome of this case depends on which of these two applicants is to be preferred under the integration criterion.[2]

39. *Whitco.* Whitco is owned by two black males, Coates and Whitehead, each of whom holds 50% of its stock. Coates is president of the corporation and proposes to work full time as general manager of the proposed station. Whitehead is vice president and proposes to work full time as the station's sales manager. Neither man has broadcast experience and neither resides in the Hollywood area, although both intend to move there if their application is granted.

40. Their integration proposal has been challenged by the other applicants, largely on the ground that the existing business obligations of Coates and Whitehead (see paras. 6, 8, *supra*) would preclude them from fulfilling their commitments to the station. These contentions have been carefully considered, but on the basis of the evidence of record they must be rejected.

41. While Coates currently works 40–50 hours per week, he has testified that he would no longer serve as a consultant to Central National Bank in Chicago if the Hollywood application is granted (Tr. 86). Coates also explained why his involvement with Coates

[2] In reaching this judgment, note has been taken of Family's local residence, broadcast experience, civic participation and the fact that its owners are members of an ethnic minority. These attributes enhance its integration but come nowhere near compensating for the vast quantitative difference between its proposal and those of Whitco and Christian.

Construction and Development, Inc., of which he is the 51% owner, will not interfere with his proposed station activities. While Coates stated that "at this point" he does not presently intend to divest himself of Coates Construction (Tr. 47), he made it clear that the reason he could and would continue this association is that it would not interfere with his responsibilities at the station. Coates testified that he has no obligation to undertake any particular number of projects on behalf of Coates Construction or to work any particular number of hours for the construction company (Tr. 86), which is primarily an investment entity (Tr. 70–71) with no employees (Tr. 54). Much of the time he presently devotes to the company involves researching potential investments for the future, an activity he does not plan to continue once the Hollywood station becomes operational because the station itself would be his major investment (Tr. 70). As stated earlier (para. 6, *supra*), Coates testified that his commitment to Coates Construction would take no more than 12–15 hours per week after grant of Whitco's application.

42. With respect to the Louisville project, the only major project with which Coates Construction is currently involved, Coates' primary area of participation is in the development phase (Tr. 80, 85), which will be "long completed" by the time the station begins operation (Tr. 80). He also stated that based upon his prior experience, he is confident that he could do whatever else might be needed for Coates Construction over the telephone (Tr. 79–80). The leasing and ultimate management of the project would be the responsibility of Coates Construction's local Louisville associates (Tr. 85).

43. In addition to explaining why his existing responsibilities would not get in the way of his ability to effectuate his commitment to the station, Coates explicitly testified that in the event of a conflict "[t]he Hollywood station would take absolute priority" over all of his other matters (Tr. 90).

44. It is also asserted that Whitehead's west coast real estate investments make his proposed integration incapable of effectuation because he has not made specific plans to retain other individuals to manage his properties in the event the application is granted. However, Whitehead testified that he would contract out much of his management responsibilities if Whitco's application is granted and that he would thereby limit the time commitment to his investments to 15 hours per week. He has explored the cost effectiveness of contracting out oversight responsibilities and intends to contract out the units he personally manages to a property management firm in the event of a grant (Tr. 140–141). He also explained that even the 15 hours per week he would devote to his investments would not interfere with his station responsibilities because the three-hour time differential between his intended residence in Hollywood, Florida and California, where his investments are located, would

permit him to do much of his real estate related work in the evenings. Finally, Whitehead testified that his commitment to the Hollywood station would take priority over his other investments to the point that he would "think in terms of divesting [himself] of those other interests" if such interests conflicted with his duties at the station (Tr. 146).

45. In short, both Coates and Whitehead have shown that they can accommodate those portions of their present activities which they will continue with their full-time integration into the station's operations, and both have also testified that the station would be their most important priority. Thus, there is an entirely reasonable likelihood that they will be able to effectuate their integration proposals. See *Central Texas Broadcasting Co., Ltd.*, 90 F.C.C. 2d 583, 586 (Rev. Bd. 1982).

46. *Christian.* Christian is a nonstock corporation with five directors. Reverend Arthur Shell is the president and Reverend John Alessi is secretary-treasurer. Both are directors, as are Selwyn Scott, Rose Pagan and Palmira Lozada. All propose to work full time at the station, Shell as general manager, Alessi as sales manager, Scott as station manager, Pagan as program director and Lozada as director of news and community affairs. Scott is black and Pagan and Lozada Hispanic. All reside within the station's service area but none in Hollywood, the community of license. Shell has appeared frequently on radio and television broadcasts and his former church once sponsored daily radio programs.

47. The credibility of Christian's integration proposal has been attacked on several grounds: that the board of directors is apt to be impermanent; that Reverend Shell's church is actually the "owner" of the applicant; and that Christian has failed to show how the directors can devote full time to the station in view of their other activities.

48. The first argument rests on speculation. Reverend Shell testified that there was always a possibility that the board might be expanded or its membership altered (Tr. 239, 262, 267–268, 271); but there is nothing in the record demonstrating that changes are presently contemplated or would be likely to occur in the near future.

49. The claim that Trinity Church would be the real owner of the station is also rejected. The church has provided substantial financial support for the applicant, and its pastor, Reverend Shell, was the moving force in the formation of the applicant (Tr. 219–221, 223–226, 303–305). As president of the corporation and general manager of the station, he is likely to remain an influential figure in the organization. However, his testimony is to the effect that while the church is supportive of the endeavor, it is understood by all that the church

would have no ownership interest (Tr. 262, 275, 281). There is nothing in the record that would contradict this testimony.[3]

50. The contention that Christian has failed to demonstrate that its integration proposal can be effectuated is more troublesome. "It is well settled that for an applicant to receive credit for the station participation of principals with other time consuming interests, the applicant must demonstrate a reasonable likelihood that the proposals would be fully effectuated." *Central Texas Broadcasting Co., Ltd., supra.* The above language and the cases cited by the Board in its decision[4] make it clear that this burden is upon the applicant.

51. As previously stated, all of Christian's directors propose to work full time at the station. The record shows that Reverends Shell, Alessi and Scott are pastors of church congregations in the Miami area. They are also active in numerous religious and social service organizations, and Reverends Alessi and Scott are involved in real estate and construction activities as well (paras. 31–34, *supra*). The applicant must therefore provide "some indication of how [these] other . . . interests will be eliminated, or curtailed"[5] so as to permit these principals to fulfill their commitments to the proposed station. The record is silent on this point. Reverend Shell stated that he would not be giving up his pastoral duties (Tr. 263), and there is no evidence that he or the others propose to curtail any of their current activities. There is also no evidence as to the amount of time tye presently devote to the interests and activities described in their testimony, but it would appear that they are living full and active lives. How they would arrange their affairs in order to devote full time to the proposed station is a matter that the applicant simply does not address on this record. In sum, the showing called for in *Central Texas, supra*, has not been made.[6]

52. Christian contends that because these individuals have submitted sworn testimony that they will work full time and since the other applicants chose not to cross-examine them on the matter, their testimony must be accepted. However, there is an inherent conflict in Christian's direct case, one that the applicant must

---

[3] Indeed, in light of a recent Review Board decision (*Las Misiones De Bejar Television Co.*, 93 F.C.C. 2d 191, FCC 83R-10, released February 11, 1983), it would appear that the absence of a specific issue on the question of ownership precludes consideration of this matter now.

[4] *Blancett Broadcasting Co.*, 17 F.C.C. 2d 227 (Rev. Bd. 1969); *Lewis Broadcasting Corp.*, 11 F.C.C. 2d 889 (Rev. Bd. 1968).

[5] *Blancett Broadcasting Co., supra*, at 230.

[6] In contrast to the absence of record evidence in this case, the principal in *Central Texas* "testified on the number of hours he would devote to his outside business interests, i.e., 5 per week; he allocated an additional 10 to 20 hours to his work week to ensure that he can meet his commitment to the broadcast station and still engage in his other interests; he presented evidence on the number of hours previously devoted to these activities; and he represented that he will terminate his positions in those outside entities should the time spent on these activities detract from his full-time duties at the broadcast station." 90 F.C.C. 2d at 586.

resolve if the testimony is to be credited. Christian's principals are described as being substantially engaged in pastoral activities and other worthy endeavors and, at the same time and without explanation, it is represented that they will devote full time to the proposed station. In the circumstances, Christian's opponents had the option to cross-examine or to let the matter rest and assert the point on the basis of the evidence already submitted.[7] In view of the record evidence regarding the proposed integration of Reverends Shell, Alessi and Scott, the following judgment reached by the Review Board in an earlier case seems appropriate here:

> [I]n view of the present . . . activities of the three . . . principals . . . and the absence of any indication these activities could or would be curtailed, it would have to be concluded that a serious doubt exists as to the amount of time which [the three principals] could effectively devote to the day-to-day operation of the station, regardless of their sincere intentions. *Lorenzo W. Milan and Jeremy D. Lansman*, 6 F.C.C. 2d 198, 204 (Rev. Bd. 1966), *aff'd sub nom. Christian Fundamental Church* v. *FCC*, 12 P&F RR 2d 2116 (D. C. Cir. 1968).

53. The presiding officer has less hesitancy in crediting the integration proposals of Lozada and Pagan. The former has addressed the problem in her testimony, which indicates that her present part-time employment would not interfere with her work at the proposed station. Pagan's testimony is less clear, but the demands on her time (para. 35, *supra*) seem less extensive than is the case with Shell, Alessi and Scott, and the credibility of her proposal seems for this reason less suspect.

54. *Ultimate Findings.* Whitco's integration proposal is preferred. Its two stockholders will work full time at the station, occupying important managerial positions, Coates in the key post of general manager and Whitehead as sales manager. Both men are presently self-employed and, unlike Christian, have explained how their current activities will be curtailed or delegated in a fashion that would permit them to fulfill their obligations to the station. From a qualitative standpoint, the integration proposal is enhanced by their proposed local residence and, more importantly, by the fact that both stockholders are black, thereby bringing to the area a broadcast facility that is wholly minority owned.

55. Christian also proposes full-time participation by all of its principals in station affairs. Its proposal suffers in comparison with Whitco's in that no evidence was introduced demonstrating how three of its directors will reconcile their numerous current activities with a full-time (i.e., 40 hours per week) commitment to work at the

[7] Christian also requests that official notice be taken of certain of its answers to interrogatories relating to this matter. It is well settled that answers to interrogatories are not a proper subject of judicial or official notice. 8 Wright, Federal Practice and Procedure, §2180 at 572; 4A Moores Federal Practice, p. 33–178; *Bracey* v. *Grenoble*, 494 F.2d 566, 570, n. 7 (3d Cir. 1974). To be considered such answers must be introduced into evidence at the trial. This was not done.

proposed station. Though the presiding officer has little doubt as to the sincerity with which the proposal is advanced, the record evidence simply provides less assurance than in the case of Whitco that its planned integration is capable of being effectuated. These individuals will not therefore be credited with full-time participation; their proposal will not be entirely discounted, however, but will be accepted as indicating considerable part-time involvement in the station.[8] Thus, with the full-time participation of the other two directors, Christian's quantitative integration amounts to 40% full-time participation and 60% substantial part time. Qualitatively, its showing is strong: all of its principals are area residents; at least three of them have been involved in laudable civic activities; and three, Scott, Pagan and Lozada, are members of ethnic minorities, the latter two being female as well.[9]

56. In sum, Whitco has been preferred because it has provided greater assurance that its proposed 100% full-time integration can be realized and because it is entirely minority owned. The former consideration establishes a significant margin of superiority for its quantitative integration; and the latter, together with local ownership, is at least sufficient to offset the enhancing elements of Christian's qualitative integration.[10] For the reasons stated at the beginning of this discussion (para. 38, *supra*), Family and Golden East must be rated far behind the other two applicants under the comparative issue.

*Conclusions*

57. It has been found that Whitco, Family and Christian, having no current ownership interests, are superior to Golden East in terms of media diversification; and as to integration of ownership with management, the only other comparative criterion relevant to this proceeding, Whitco is to be preferred. It is therefore concluded that the public interest, convenience and necessity would be best served by a grant of the Whitco application

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Whitco Broadcasters, Inc. for a permit to construct a new commercial television station on Channel 69, Hollywood, Florida IS GRANTED and the applications of Family

[8] See *Lewis Broadcasting Corp., supra*, at 892–893.

[9] Under the heading of broadcast experience, note is also taken of Reverend Shell's frequent appearances over radio and television.

[10] See *Waters Broadcasting Corporation*, 91 F.C.C. 2d 1260 (1982); 52 P&F RR 2d 1063, 1068 (minority ownership given "full application and significant weight" in comparative cases).

Television 69, Inc., Golden East Broadcasters, Inc. and Christian Media of Florida, Inc. for the same facility ARE DENIED.[11]

FEDERAL COMMUNICATIONS COMMISSION
JOHN H. CONLIN, *Administrative Law Judge*

---

[11] In the event exceptions are not filed *within 30 days after the release of this Initial Decision*, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).



☆ U.S. GOVERNMENT PRINTING OFFICE: 1983—421-692/06